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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999
Industrial Relations (Tribunals) Rules 2000

NOTICE

The following Agreements have been certified by the Commission:—

No/s	Title	Date certified	Cancelling
CA484/01	The Wesley Hospital Auchenflower and Wesley Turrawan Hospital - Administration Employees - Certified Agreement 2001	2/11/01	CA17/99
CA497/01	Burdekin Community Association Inc - Certified Agreement 2001	2/11/01	
CA502/01	Sunshine Coast Private Hospital (Nurses) Enterprise – Certified Agreement 2001	2/11/01	
CA506/01	Plaster Manufacturing - Boral Australian Gypsum Limited (Enterprise Bargaining) - Certified Agreement	2/11/01	CA496/99
CA498/01	Brisbane Catholic Education - Principals' - Certified Agreement 2001	5/11/01	CA258/98
CA490/01	Highland Grove Agribusiness Pty Ltd as Trustee for the Highland Grove Agri Trust - Certified Agreement	7/11/01	
CA496/01	Australian Red Cross Blood Service - Queensland Enterprise Bargaining - Certified Agreement 4 2001	12/11/01	
CA499/01	Mercy Food Service Rockhampton - Certified Agreement 2001	12/11/01	
CA487/01	Greenslopes Private Hospital - QPSU and Others - Certified Agreement 2001	13/11/01	
CA495/01	Ramsay Health Care Queensland - Nursing Employees – Certified Agreement 2001	13/11/01	
CA510/01	The Scots PGC College - Certified Agreement	13/11/01	CA1/99

E. EWALD
Industrial Registrar

INDUSTRIAL COURT OF QUEENSLAND

Industrial Relations Act 1999 – s. 341(1) – appeal against decision of industrial commission**Colin Earner AND Queensland Investment Corporation
and QIC Properties Pty Ltd (No. C43 of 2001)**

PRESIDENT HALL

8 November 2001

DECISION

The appellant who was formerly a Senior Leasing Executive with Queensland Investment Corporation (a wholly owned subsidiary of QIC Properties Pty Ltd) sought relief under s. 276 of the *Industrial Relations Act 1999*. The respondent took the preliminary point that s. 276 (6) denies the appellant access to the relief otherwise made available by s. 276. The Commission resolved the point in favour of the respondent. The appellant's application was struck out. The decision is reported at 167 QGIG 267. This is an appeal against that decision.

The material facts are–

- (a) when employed as a Senior Leasing Executive the appellant earned a salary in excess of \$71,200 per annum;
- (b) the application under s. 276 related to the contract pursuant to which the appellant had been employed as a Senior Leasing Executive;
- (c) at the time that the application was made the appellant was unemployed and had no annual wage; and
- (d) at no material time had the appellant been a public service officer employed on tenure under the *Public Service Act 1996*.

Section 276(6) provides as follows:–

- “(6) A person can not make an application under this section if –
- (a) an application has been made under section 74 for the same matter; or
 - (b) the person –
 - (i) is not a public service officer employed on tenure under the *Public Service Act 1996*; and
 - (ii) has an annual wage of more than \$68,000* or a greater amount stated in, or worked out in a way prescribed under a regulation.”.

*The figure of \$68,000 is now to be read as \$71,200 as a consequence of s. 4 of the *Industrial Relations Regulation 2000*.)

The appellant advances two contentions. One, the appellant was not denied access to relief under s. 276 because he did not have an annual wage of more than \$71,200 when he made the application. Two, the appellant was not denied relief under s. 276 because he was not a public service officer on tenure under the *Public Service Act 1996*.

At the heart of the first contention is the proposition that at s. 276(6) “has an annual wage” is used in a temporal sense and suggests contemporaneity with the making of the application. For the respondents' reliance is placed on s. 276(1) and the decision of the High Court in *Re Dingjan, ex parte Wagner* (1994-1995) 183 CLR 323. Section 276(1) provides as follows:–

- “(1) On application, the commission may amend or declare void (wholly or partly) a contract if it considers –
- (a) the contract is –
 - (i) a contract of services that is not covered by an industrial instrument; or
 - (ii) a contract for services; and
 - (b) the contract is an unfair contract.”.

Re Dingjan, ex parte Wagner (1994-1995) 183 CLR 323 did not, of course, concern s. 126(1). The subject matter of *Re Dingjan ex parte Wagner, ibid*, was the unfair contract provisions of the *Industrial Relations Act 1988 (C'wth)*. But, materially, the High Court was required to consider whether s. 127B of the *Commonwealth Act* conferred power to set aside or vary a contract which had been discharged. By a majority, (Brennan J dissenting) it was held that s. 127B did confer such power, notwithstanding the use of the present tense. Importantly, at 362 Gaudron J observed:

“The present tense may be used descriptively or it may be used to signify contemporaneity. Although there is no fixed rule, the use in a statute of the present tense, simpliciter, generally indicates that it is being used descriptively (the “simple present”), whereas “is” followed by a present participle (the “continuous” or “progressive” present) usually indicates contemporaneity.”.

As I understand the appellant's argument it is not contended that the present tense at s. 276(1) is used other than descriptively. Neither is it contended that s. 276 does not apply where the contract has been executed, performed or discharged or is otherwise at an end. The submission is that s. 276(6) had no counterpart in the mix of Commonwealth provisions considered in *Re Dingjan, ex parte Wagner, op.cit* and that decision is not directly in point. The submission is correct, though the observations of Gaudron J would appear to assert a guideline of general application. The point of emphasising s. 276(1) is that the provisions describe the contracts which are exposed to the relief at s. 126. If like s. 276(1), s. 276(6) is read descriptively, the annual wage which will deny an applicant relief, is an annual wage fixed by the contract subject to attack. If “has” is treated as suggestive of contemporaneity, the availability of relief will depend on circumstances unrelated to the contract under attack. A former employee who always had an annual wage in excess of \$71,200 whilst employed, would, (for the first time) be entitled to attack his employment contract on the day on which it terminated and would promptly lose the opportunity if he accepted employment with a new employer wholly unrelated to his former employer, say, three days later.

Reliance is placed on the character of s. 276, which is said to be remedial legislation and to be beneficially construed. Reliance is placed also on s. 3(a) of the Act by which it is declared that one means by which the Act achieves its principal object is by “providing for rights . . . and social justice for all employees”. It is submitted that s. 276(6) should be read so as to restrict the range of employees denied access to the relief at s. 276, and to allow all employees the option of tolerating an unfair contract or terminating the contract and attacking it under s. 276. There is some merit in the proposal, but it

is a proposal for legislative change which cannot be adopted in the course of interpreting the existing provision. There is nothing remedial about s. 276(6)(b)(ii). It denies relief to a small group of employees whose employers remain free to seek to modify the contract pursuant to s. 276. It does so notwithstanding that contractors similarly remunerated retain the right to relief under s. 276.

Reliance is also placed upon the history of s. 276(6). In its original form s. 276 (6) provided:

“A person can not make an application under this section if:–

- (a) an application has been made under section 74 for the same matter; or
- (b) the person is someone to whom chapter 3, part 2 does not apply under section 72.”.

Section 72 relevantly provided:

“(1) Part 2 does not apply to –

- (a) an employee during the first 3 months of employment with an employer (the “probationary period”), if the dismissal is for a reason other than an invalid reason, unless the employee and employer agree in writing that the employee serve –
 - (i) a period of probation that is shorter than the probationary period; or
 - (ii) no period of probation; or
- (b) an employee serving a period of probation that is longer than the probationary period, if –
 - (i) the period decided, by written agreement between the employee and employer before the employment started, is a reasonable period having regard to the nature and circumstances of the employment; and
 - (ii) the dismissal is for a reason other than an invalid reason; or
- (c) a short term casual employee; or
- (d) an employee engaged for a specific period or task, unless the main purpose of engaging the employee in that way is, or was at the time of the employee’s engagement, to avoid the employer’s obligations under part 2; or
- (e) an employee –
 - (i) who is not employed under an industrial instrument; and
 - (ii) who is not a public service officer employed on tenure under the *Public Service Act 1996*; and
 - (iii) whose annual wages immediately before dismissal are more than \$68 000 or a greater amount stated in, or worked out in a way prescribed under a regulation; or
- (f) an apprentice or trainee.”.

Whatever might have been intended the recasting of s. 276(6) wrought by the *Training and Employment Act 2000* made much change. Howsoever s. 72(1)(e) was to be construed, each of the following categories, viz –

- employees on probation;
- casual employees;
- employees on a fixed term engagement; and
- employees employed for a specific task;

previously denied access to the relief at s. 276 were granted access to that relief. In asserting in his Second Reading Speech that–

“The amendments to the Act fall within three * categories. The first involves technical amendments that ensure the provisions of the Act operate in the manner that they were intended. Users of the Act have brought these to my attention since the introduction of the Act in July, 1999. These amendments do not involve any changes to the policy position established in the Act last year.”.

*[The other categories related to unfair dismissal for Federal award employees and consequential amendments.]

the Minister, with respect, fell into error. But there is no extrinsic material to which regard may legitimately be had, and certainly there is nothing in the *Training and Employment Act 2000*, to suggest that the wheel had gone full circle, and a policy of denying access to s. 276 to those denied a remedy for an unfair dismissal had become a policy of allowing access to s. 276 to all persons denied a remedy for an unfair dismissal whilst, in the case of those of them with an annual wage of \$71,200, denying access to s. 276 during the currency of the contract.

The appellant’s first contention must be rejected.

The appellant’s second contention, viz the appellant was not denied relief under s. 276(6) because he was not a public service officer on tenure under the *Public Service Act 1996*, may be more readily disposed of.

It may be conceded that because of the double negative s. 276(6)(b) is substantially unintelligible. The Commission took some liberty with the words chosen by Parliamentary Counsel and read the provision as meaning “A person cannot make an application if the person is other than a public servant on tenure and is a person who has an annual wage of more than \$71,200”. The alternative construction, and the construction pressed by the appellant, is that

the provision should be read as if the word "not" where it secondly appears should be deleted. So read, and noticing that the conjunctive "and" is used between subparagraph (i) and subparagraph (ii), the provision creates only one exclusion. The only persons excluded are those who are employed on tenure under the *Public Service Act 1996* and who are also in receipt of an annual wage of \$71,200 or more. The Commission considered that construction but rejected it on the ground that the Commission was not at liberty to consider any word as superfluous or insignificant, compare Pearce DC and Geddes RS, *Statutory Interpretation Australia* (Fourth Edition), at para 2.12. Notwithstanding an infelicitous passage in *Braunack v Couriers Please* (2000) 165 QGIG 225, affirmed on appeal 166 QGIG 141, I consider the argument to which the Commission yielded to be entirely persuasive.

In all the circumstances I dismiss the appeal. I reserve the question of costs.

Dated this eighth day of November, 2001.

D.R.HALL, President.

Appearances:-
Mr G. Martin SC instructed by Blake Dawson and Waldron, Solicitors, for the appellant.
Mr A.K. Herbert instructed by McCullough Robertson, Solicitors, for the respondent.

Released: 8 November 2001

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INDUSTRIAL COURT OF QUEENSLAND

Industrial Relations Act 1999 – s. 342(1) – appeal against decision of industrial magistrate

**Clive Peter Williams t/a as Queensland Institute of Property Studies
AND State of Queensland (No. C61 of 2001)**

PRESIDENT HALL

14 November 2001

DECISION

On 24 July 1997, Clive Peter Williams trading as Queensland Property Services applied for recognition as an approved Training Organisation pursuant to s. 61(3) of the *Vocational Education, Training and Employment Act 1991* (hereafter referred to as VETE Act). By a letter dated 1 August 1997, the Vocational Education, Training and Employment Commission (hereafter VETE Commission), which by s. 9 of the VETE Act had power to recognise the vocational education and training establishment as an approved training organisation, informed Mr Williams that he was approved to provide training in the Diploma of Business (Real Estate Management). By a letter dated 28 October 1998 Mr Williams received approval to provide training in Certificate IV in Property Services (Real Estate Operators).

In November 1997, the Commonwealth state and territory Ministers for Vocational Education and Training agreed to a set of (new) national principles for registration of training organisations. The principles are contained in the Australian Recognition Framework (hereafter ARF). The principles were implemented nationally from 1 August 1998.

The VETE Act had already been amended (by Act number 81 of 1993) to deal with the circumstances in which a person conducting a Vocational Education and Training Establishment is authorised to confer an award and to penalise unauthorised persons who purport to confer awards (or advertise the willingness to do so).

Section 67 relevantly provided:

“Control over matters about the conferring of awards

67.(1) In this section –

‘advertisement’ of a matter includes a verbal or written representation that –

- (a) is intended to inform, or is likely to have the effect of informing, another person of the matter; or
- (b) is intended, or likely, to induce another person to believe the matter.

‘prescribed words’ means –

- (a) if the course for which the award is issued has not been accredited –
 - ‘The course for which this award is issued has not been accredited under the *Vocational Education, Training and Employment Act 1991*’;
 - and
- (b) if the entity conferring or offering to confer the award is not registered to provide the course for the award –
 - ‘The provider of this award is not registered under the *Vocational Education, Training and Employment Act 1991*’.

‘vocational education and training establishment’ includes a State college.

(2) A person conducting a vocational education and training establishment is authorised to confer an award if –

- (a) the award is for a course accredited by the Accreditation Council and the person –
 - (i) provides, and is registered by the Accreditation Council to provide, the course; or
 - (ii) is authorised to confer the award by the entity that provides, and is registered by the Accreditation Council to provide, the course; or
- (b) the person is authorised by a law of the Commonwealth, another State or a Territory to confer the award.

(3) A person conducting a vocational education and training establishment who is not authorised to confer an award must not –

- (a) confer the award; or
- (b) offer to confer the award; or
- (c) advertise that the person is authorised to confer the award.

Maximum penalty – 40 penalty units.

(4) A person conducting a vocational education and training establishment must not advertise that another person who is not authorised to confer an award –

- (a) confers the award; or
- (b) offers to confer the award; or
- (c) is authorised to confer the award.

Maximum penalty – 40 penalty units.

(5) Subsections (3) and (4) apply to –

- (a) a person conducting a vocational education and training establishment in Queensland who does any of the acts mentioned in either subsection in Queensland or elsewhere; and
- (b) a person conducting a vocational education and training establishment outside Queensland who does any of the acts mentioned in either subsection in Queensland.

(6) Despite subsection (3), a person who is not authorised to confer an award may –

- (a) if the prescribed words are written on the award – confer the award; and
- (b) if the prescribed words are stated in any offer or advertisement made by or on behalf of the person – offer to confer the award or advertise that the person may lawfully confer the award.”.

Section 67 was quite uninformative about the basis on which the Accreditation Council was to go about the exercise of the power conferred by subsection (2). The intention was that that matter was to be dealt with by regulation. Section 126(2)(b) authorised the making of regulations about “training courses” whilst s. 126(2)(i) allowed the making of regulations about “recognition of vocational education and training establishments”.

After the ARF was adopted nationally, a new regulation, the *VETE Amendment Regulation (No. 1) 1999* was made to ensure that the training organisations offering awards approved pursuant to s. 67(2) were training organisations which met the new national standards required to be met by a training organisation in order that its awards would be granted national recognition. (The other part of the scheme, viz the Training Packages part of the scheme, sets national standards against which students are to be assessed.) The *VETE Amendment Regulation (No. 1) 1999* took effect on 1 July 1999. Existing approved training organisations, such as the business operated by Mr Williams, were taken to be “registered training organisations” under the new scheme. Such organisations, and in particular Mr Williams’ organisation, had been informed that within three years of the introduction of the ARF on 1 January 1998 they would be audited to ensure compliance with the regime established by what is now *VETE Amendment Regulation (No. 1) 1999*. In the case of Mr Williams’ organisation audits were conducted in September, November and December 1999. The importance of audits and compliance arises from s. 45 of the *VETE Amendment Regulation (No. 1) 1999* which provided as follows:–

“Cancellation or suspension of registration, status or part of scope

45.(1) The Accreditation Council may cancel or suspend an organisation’s registration or quality endorsed status, or part of the scope of its registration or status, if the Accreditation Council is satisfied the organisation –

- (a) was granted the registration or status in error or because of false or misleading information; or
- (b) has failed substantially to comply with the requirements under the framework applying to the organisation;
- (c) has failed to allow, or satisfactorily cooperate with, an audit under section 48; or
- (d) has failed to pay a fee under schedule 1, part 4.

(2) Before taking action under subsection (1), the Accreditation Council must give the organisation a written notice that –

- (a) states the proposed action, including the period of any proposed suspension;
- (b) states the grounds for the proposed action; and
- (c) outlines the facts and circumstances forming the basis for the grounds; and
- (d) invites the organisation to show within a stated period (the ‘**show cause period**’) why the proposed action should not be taken.

(3) The show cause period must be a period ending at least 10 working days after the show cause notice is given to the organisation.

(4) If an organisation’s registration, status or part of its scope of registration or status is cancelled or suspended, the organisation must deliver its certificate of registration or certificate of status to the Accreditation Council within 5 working days after the Accreditation Council demands its delivery.

(5) Mutual recognition under the framework may be cancelled or suspended as if it were a registration or status mentioned in subsection (1).”

The Accreditation Council, I should interpolate, played no role in the matter presently before this Court. That is because pursuant to s. 26 of the VETE Act it had delegated its powers to the Registration Management Committee (hereafter RMC), a standing committee established by the VETE Commission under s. 11(f) of the VETE Act. I note that the appellant complains that evidence was not led of the steps taken by the Accreditation Council to delegate its powers to RMC and evidence was not led that the decision purportedly taken by the RMC in pursuance of the delegation was in truth taken pursuant to the delegation. The answer to the complaint is that by s. 27(3)(B) and (6) of the *Acts Interpretation Act 1954* those matters are presumed “unless the contrary is proved”.

After consideration of the audit reports the RMC issued a show cause notice to Mr Williams on 28 February 2000 requiring him to show cause why his registration as a registered training organisation should not be cancelled. On 28 March 2000 Mr Williams appeared before the RMC to answer the show cause. By a letter dated 30 March 2000, the RMC informed Mr Williams of the cancellation of his status as a registered training organisation was to take effect at the expiration of five working days from the receipt of the notice. Pursuant to s. 124(1) of the VETE Act Mr Williams appealed to the VETE Commission. The appeal was heard on 14 July 2000 (by a sub committee). On 27 July 2000 Mr Williams was notified that his appeal had been unsuccessful. On 17 August 2000, pursuant to s. 124(3), Mr Williams filed an application to appeal in the Industrial Magistrates Court, Brisbane.

The VETE Act was repealed by the *Training and Employment Act 2000* as and from 28 September 2000. However, the transitional provisions at Part 3 Chapter 10 include s. 298 which provides as follows:—

“Proceedings

298.(1) A proceeding by or against the corporation or a former body that has not ended before the commencement of this section may be continued and finished by or against the State.

(2) A proceeding that could have been taken by or against the corporation or a former body if the corporation or former body had continued to exist, may be taken by or against the State.”

Pursuant to that provision Mr Williams’ appeal to the Industrial Magistrates Court was continued and finished as an appeal against the State. The decision on the appeal was adverse to Mr Williams. Mr Williams now appeals to this Court. There is an issue as to whether he is entitled to do so. By s. 124(11) of the VETE Act:

“A party aggrieved by a decision of an Industrial Magistrate may appeal to an Industrial Court but only on a question of law.”

That appeal is not preserved by the transitional provisions at part 3 chapter 10 of the *Training and Employment Act 2000*.

There are three basis upon which it may be asserted that Mr Williams has an appeal to this court.

One, it may be argued that an appeal on a question of law to the Industrial Court was an incident of the right to appeal to the Industrial Magistrates Court which, within the meaning of s. 20(2)(c) of the *Acts Interpretation Act 1954*, had accrued prior to the repeal of the VETE Act.

Two, it may be argued that Mr Williams is entitled to invoke the supervisory jurisdiction of the Industrial Court under s. 248(1)(e) of the *Industrial Relations Act 1999* to ensure, by prerogative order or other appropriate process –

(i) the Commission and Magistrates exercise their jurisdiction according to law;

and

(ii) the Commission and Magistrates do not exceed their jurisdictions.

[It may fairly be said that the pleadings make no attempt to invoke the supervisory jurisdiction. However, granted that Mr Williams is not legally represented, there is some justification for taking a liberal approach to amendment.]

Three, it may be argued that the general power of the Industrial Court to entertain appeals against Industrial Magistrates at s. 341(2) with *Industrial Relations Act 1999* may be availed of. Previously, that provision had no application to appeals against Industrial Magistrates given under the VETE Act. The reason was by s. 348 an appeal under s. 341 is an appeal by way of re-hearing in the sense explained in *Warren v Coombs* (1978-1979) 142 CLR 531 at 551. An appeal under s. 124(11) of the VETE Act was an appeal on the ground of error of law. Inevitably, the general power yielded to the specific power. That obstacle of course has now been removed. It must, however, be said against the argument that the *Training and Employment Act 2000* makes provision (s. 224), comparable to s. 124(3) of the VETE Act, for an appeal to the Magistrates Court (not the Industrial Magistrates Court) and that s. 229 of the *Training and Employment Act 2000* permits a further appeal to the District Court (not the Industrial Court) on a question of law only. It is a little difficult to accept that it was the intention of the legislator that under both the VETE Act and the *Training and Employment Act 2000* the ultimate appeal was to be on a question of the law only, whilst appeals pending in the Industrial Magistrates Court at the repeal of the VETE Act fall into a hiatus where the ultimate appeal is by way of rehearing.

It is not necessary to resolve the conundrum. Having heard the argument upon the grounds of appeal I am satisfied that the outcome will be the same whether the appellant is restricted to the ground of error of law or is allowed the advantage of the wider rule in *Warren v Coombs* (1978-1979) 142 CLR 531 at 551 per Gibbs ACJ, Jacobs and Murphy JJ:

“Shortly expressed, the established principles are, we think, that in general an appellate Court is in as a good a position as the trial Judge to decide on the proper inference to be drawn from facts which are undisputed or which, having being disputed, are established by the findings of a trial Judge. In deciding what is the proper inference to be drawn, the appellate Court will give respect and weight to the conclusion of the trial Judge, but, once having reached its own conclusion, will not shrink from giving effect to it.”

In those circumstances and given that I have concluded that Mr Williams’ appeal must fail in any event, the proper course is to refrain from determining whether there is an appeal and the nature of any such appeal, until the issue has been argued in a case in which both parties are represented by counsel.

It is necessary to say something of the proceedings before the Industrial Magistrate.

By s. 124(7) of the VETE Act the appeal to the Industrial Magistrate was “to be by way of re-hearing, unaffected by the decision appealed against”. The Acting Industrial Magistrate took the view that the appeal was by way of a hearing *de novo*. I consider that His Worship was right to take that approach to the appeal. It is convenient to note that one of the grounds of appeal taken by Mr Williams is that the Acting Industrial Magistrate erred in declining to

admit evidence directed to showing that at least some of those who conducted the audit and participated in a decision-making process (previously described) which lead to the loss of Mr Williams' registration were in a situation of conflict of interest. The evidence was rightly rejected as irrelevant. Assuming conflict of evidence might be made out, all was cured by the hearing *de novo* before the Acting Industrial Magistrate, compare *Calvin v Carr and Others* (1979) 22 ALR 417 at 428 (Privy Council).

By his decision of 3 August 2001 the Acting Industrial Magistrate found that on the evidence Mr Williams' organisation had within the meaning of s. 45(1)(b) of the *VETE Amendment Regulation (No. 1) 1999* failed to comply with the requirements under the framework applying to the organisation by reason of the circumstance that:-

- (a) Mr Williams had not held a Real Estate Agents licence since 15 December 1999 and therefore did not meet the required standard of holding an industry licence when training in Certificate III and above;
- (b) Mr Williams, being a training deliverer at diploma level did not hold a Diploma of Business Real Estate Management as required by the standard, in that the Diploma of Business Real Estate Management which he held had been issued to him by the Queensland Institute of Properties of Studies, an organisation which was not incorporated and which was but a name by which Mr Williams traded as a sole trader, and in that the Diploma had been issued by a staff member who did not at that time himself hold a Diploma of Business Real Estate Management;
- (c) Mr Williams' organisation failed to teach students in accordance with the requirements of the Trust Account Module in that the module requires the teaching material and the learning outcomes to be consistent with the relevant legislation, relevantly the now repealed *Auctioneers and Agents Act 1971* in that the instruction provided was not consistent with s. 104 of the *Auctioneers and Agents Act 1971* in that students were not instructed that monies received by a real estate agent in respect of a sale or any other transaction must be banked immediately with a financial institution;
- (e) Mr Williams failed to make clear to all individuals seeking assessment the assessment procedures and the criteria for judging performance; and
- (f) Mr Williams' organisation failed to maintain assessment systems incorporating mechanisms for recording, storing and accessing outcomes.

It is put in support of the appeal that the Acting Industrial Magistrate did not find that any of the complaints made about Mr Williams which His Worship found to have been established by the evidence amounted to a substantial failure to comply with the framework. It is of course against substantial non-compliance that s. 45 of the *VETE Amendment Regulation (No. 1) 1999* is directed.

In fact, at page 10 paragraph 3 of his decision the Acting Industrial Magistrate did find that the omission to hold a Diploma of Business Real Estate Management was substantial non-compliance. More importantly, as the Acting Industrial Magistrate pointed out, on the hearing *de novo* Mr Williams, as appellant, carried the onus of proof. It was for Mr Williams to establish affirmatively that he had "substantially" complied with the framework. Given the number and objective gravity of the deficiencies found against Mr Williams, it would have been extraordinary if the Acting Industrial Magistrate had held that Mr Williams had discharged that onus.

In support of the appeal it is contended that s. 45 of the *VETE Amendment Regulation (No. 1) 1999* is invalid. The submission is that it is outside the objects of the VETE Act. The short answer is that s. 45 is within the substantive of provisions of the VETE Act previously discussed. In any event, s. 45 forms part of a legislative to give effect to the objects of the VETE Act at s. 3(d),(f) and (g). By those paragraphs, amongst the objects of the Act, are -

- “(d) to provide for a system of accreditation of vocational education and training courses to ensure the quality of those courses; and
- ...
- (f) to promote cross-crediting and articulation of courses between providers of vocational education and training and other sectors of education so as to maximise progression of students; and
- (g) to regulate training including apprenticeship, traineeship and other training systems; and
- ...
- (j) to promote the development of a national vocational education and training system in accordance with the National Statement.”.

There is no inconsistency between s. 45 of the *VETE Amendment Regulation (No. 1) 1999* and s. 65 of the VETE Act. Section 65 is about cancellation of the (earlier) Certificates of Recognition and Approval issued pursuant to s. 61 of the VETE Act.

In the alternative, it is contended that s. 45 of the *VETE Amendment Regulation (No.1) 1999* is inconsistent with the *Australian National Training Authority Act 1992* (Cwth) (hereafter ANTA Act), it is submitted that, s. 45 is rendered inoperative by the operation of s. 109 of the Constitution.

An examination of the objects, functions and powers contained within the ANTA Act shows plainly enough that the function of the act is to ensure that the Commonwealth provides advice and supervision to ensure that the ARF meets the needs and the intentions of the agreement between the Commonwealth, States and the Territories. The ANTA Act envisages that the implementation of the ARF will be addressed by State (and Territory) legislation. Section 45 of the *VETE Amendment Regulation (No. 1) 1999* and the other sections of that regulation do not trespass upon the field covered by the Commonwealth Act. Section 109 of the constitution has no application.

In consequence of the submission about s. 109 of the constitution an issue arose as to whether s. 78(B) of the *Judiciary Act 1903* (Cwth) had application to the proceedings. Section 78B provides as follows:-

“**78B (1)** [In Constitutional matter] Where a cause pending in a federal court including the High Court or in a court of a State or Territory involves a matter arising under the Constitution or involving its interpretation, it is the duty of the court not to proceed in the cause unless and until the court is satisfied that notice of the cause, specifying the nature of the matter has been given to the Attorneys-General of the Commonwealth and of the States, and a reasonable time as elapsed since the giving of the notice for consideration by the Attorneys-General, of the question of intervention in the proceedings or removal of the cause to the High Court.

78B (2) [Powers of court pursuant to subsec (1)] For the purposes of subsection (1), a court in which a cause referred to in that subsection is pending:

- (a) may adjourn the proceedings in the cause for such time as it thinks necessary and may make such order as to costs in relation to such an adjournment as it thinks fit;

- (b) may direct a party to give notice in accordance with that subsection; and
- (c) may continue to hear evidence and argument concerning matters severable from any matter arising under the Constitution or involving its interpretation.”.

A cause does not “involve” a matter arising under the constitution or involve its interpretation merely because someone asserts that it does, compare *Re Finlayson, ex parte Finlayson* (1997) 72 ALJR 73 at 74 per Toohey J. It is for the Court to determine whether there is a real and substantial constitutional issue, *CACC v CG Berbatis Holdings Pty Ltd* (1999) 95 FCR 292 at 300 per French J. In particular, “[s]ection 78B does not impose on the Court a duty not to proceed pending the issue of a notice no matter how trivial, unarguable or concluded the constitutional point may be. If the asserted constitutional point is frivolous or vexatious or raised in abuse of process, it will not attach to the matter in which it is raised the character of the matter arising under the constitution or involving its interpretation . . .”, *ACCC v CG Berbatis Holdings Pty Ltd, ibid*, at 297 per French J. I certainly do not suggest that Mr Williams is engaged in an abuse of process, but it is clear that the submission is unarguable and based on an entirely erroneous construction of the *ANTA Act 1992*. In those circumstances, I decided to hear the matter notwithstanding that the relevant notices had not been issued.

Mr Williams contended that the matters found against him by the Acting Industrial Magistrate were not matters required by the National Real Estate Curriculum. The point is that the short comings found against Mr Williams were failures to meet the standards required to be met by the ARF in presenting the various curricular to students.

It is contended that the audit of November 1999 is inconsistent with independent audits organised by Mr Williams. Since the auditors were not called as witnesses, the Acting Industrial Magistrate was entitled to ignore those audits.

The circumstance that the audit of March 1999 did not lead to the issue of a show cause notice does not invalidate the show cause notice issued after the audits of September, November and December 1999.

Notwithstanding the submissions of Mr Williams, I share the view of the Acting Industrial Magistrate that a sole trader may not issue a Diploma to himself whether directly or through the agency a person unqualified to issue such a diploma.

It is contended that the decision of the Industrial Magistrate that Mr Williams had adequate knowledge of the ARF at the time of November 1990 audit was contrary to the evidence. There was a conflict of evidence. It was open to the Acting Industrial Magistrate who had had the advantage of seeing and hearing the witnesses to make the findings which His Worship did. In any event, the finding is not material to the ultimate decision in the matter. Compliance is to be objectively assessed.

It is contended that the Acting Industrial Magistrate erred in law in insisting on strict observance of the rules of evidence when s. 320(2)(a) of *Industrial Relations Act 1999* authorised the Industrial Magistrates Court to depart from the rules of evidence. It is true that s. 320 does allow the Industrial Magistrate some discretion to depart from the rules of evidence. This is not a case in which it is necessary to examine the limits of discretion. It is sufficient to say that the discretion was the Acting Industrial Magistrate’s discretion and that nothing has been shown to bring the case within the rule in *House v The King* (1936) 55 CLR 499 at 504-505, *viz*

“The manner in which an appeal against an exercise of discretion should be determined is governed by established principles it is not enough that the judges composing the appellate Court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant to matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the material for doing so. It may not appear how the primary judge reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes and the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that substantial wrong has in fact occurred.” (Per Dickson, Evatt and McTiernan JJ).”.

It is a significant complaint of Mr Williams that the Industrial Magistrate refused to hear and determine another industrial matter *viz* a claim for arrears of wages alleged to be owing to Mr Williams in the sum of \$44,936.00. There are provisions in the *Industrial Relations Act 1999* which provide for the recovery of arrears of wages in the Industrial Magistrates Court. It is open to Mr Williams to take advantage of those provisions. However, at the time of the proceedings before the Acting Industrial Magistrate Mr Williams had not done so, and the claim for wages might not properly have been brought before the Court.

A submission that the Acting Industrial Magistrate should have been sitting in Federal jurisdiction flows from the point about s. 109 of the constitution with which I have previously dealt.

It is not open to Mr Williams to complain that he was misled about the commencement of the regulatory system to give effect to the ARF. A document of 2 January 1998 purportedly signed by Mr Williams indicated that Mr Williams understood that he had to work towards implementation of the new system and implement it by 30 June 1999 the Acting Industrial Magistrate found that it had in fact been signed by Mr Williams. That finding was plainly open to the Acting Industrial Magistrate.

It is submitted that “In order for the Industrial Magistrate to conclude that the appellant does not hold a diploma, the Magistrate would have to believe that the appellant was incapable of carrying on a business as a real estate agent between the years of 1993 and 1999”. The issue of course was whether Mr Williams did have a diploma. Similarly the submission that Mr Williams has the knowledge, skills and abilities to obtain the real estate agent’s licence misses the mark. The issue is whether at the material time he did in fact hold such a licence. Mr Williams’ capacity to acquire a licence and discharge its obligations was not an issue.

It is submitted that the Human Resources Standard “was part of the ARF and takes precedence over it”. The point sought to be made is not immediately clear. It is sufficient to say that as the Acting Industrial Magistrate plainly understood, the Human Resources Standard was required to be used in the implementation of the ARF and took precedence over the national curriculum.

With respect to Mr Williams, it is unnecessary to determine the true effect of s. 49 of the *ANTA Act 1992* which provides that for the purposes of s. 49, State staff seconded to the Commonwealth or whose services are made available to the Commonwealth, are members of the staff of the Australian National Training Authority. Here, the only powers which the relevant State officers and/or employees were exercising were powers vested by the *VETE Act* and a regulation made thereunder.

In all the circumstances I dismiss the appeal. I reserve the question of costs.

Dated this fourteenth day of November, 2001.

D.R. HALL, President.

Appearances:-

The appellant in person.

Ms M. Moloney of Counsel instructed by Ms K. Watson of Crown Law for the respondent.

Released: 14 November 2001

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 277 – power to grant injunctions

**The Australian Workers' Union of Employees, Queensland
AND WMC Resources Limited and Another (No. B1125 of 2001)**

VICE PRESIDENT LINNANE

9 November 2001

Application for injunctive relief – Applicant seeking right of entry for authorised industrial officer to access mine site – Access denied on the basis that all employees employed pursuant to Australian Workplace Agreements – *Workplace Relations Act 1996* gives right of entry where Australian Workplace Agreements operate to Employment Advocate and exclude right of entry to industrial organisations – Commonwealth legislation intended to cover the field with respect to such right of entry – Section 373 of the *Industrial Relations Act 1999* does not enable an authorised industrial officer a right of entry to talk with members during non-working time where work is performed by persons employed under Australian Workplace Agreements.

DECISION

This is an application by The Australian Workers' Union of Employees, Queensland (Applicant) for injunctive relief against both WMC Resources Limited (First Respondent) and Eurest (Australia) Support Services Pty. Ltd. (Second Respondent). The Applicant seeks, *inter alia*, a right of entry for an authorised industrial officer of the Applicant to the Phosphate Hill Mine site (the "mine site") to undertake various activities. The First Respondent operates the Phosphate Hill Mine. The Second Respondent is the industrial caterer engaged by the First Respondent to provide meals and other services for the personnel at the mine site.

The Australian Mines and Metals Association (Inc.) Queensland Branch (AMMA) sought leave to make brief submissions. There was no objection to such leave being granted and leave was granted. Essentially the AMMA adopted the submissions of the First and Second Respondents and urged the dismissal of the application.

The Applicant relied upon the evidence of Daryl Arthur Harrison, an authorised industrial officer of the Applicant. On 11 May 2001 Mr Harrison visited the mine site intending to see and speak with members employed by the Second Respondent. He informed Paul Gibbs, the Acting Manager of the Second Respondent that he wanted to "speak with members of the AWU during their lunch break". Mr Gibbs told Mr Harrison that he would not be allowed access to the mine site because all of the employees were engaged under Australian Workplace Agreements (AWAs). In the absence of an AWA the terms and conditions of employment of employees of the Second Respondent employed at the mine site would be governed by the *Café, Restaurant and Catering Award – State (Excluding South-East Queensland)* or the *Mining (Non Coal) Award – State*. Div 6 of Part VID of the *Workplace Relations Act 1996* makes it clear that an AWA operates to the exclusion of a State award or State agreement that would otherwise apply: see s. 170VQ(4).

Given that this is an application for injunctive relief it is noted that Mr Harrison's request of Mr Gibbs was to "speak with members of the AWU during their lunch break". Whilst argument was advanced before me about the issues that Mr Harrison may have wanted to discuss with members no detail of those matters was provided to Mr Gibbs.

It is common ground that all employees of the Second Respondent at the mine site were, on 11 May 2001, employed pursuant to AWAs in a format such as Attachment SF1 to Exhibit 2 in these proceedings.

The relevant provisions of the *Industrial Relations Act 1999* (Queensland Act) are as follows:-

"Right of entry – authorised industrial officer

372.(1) An authorised industrial officer may enter a workplace at which an employer carries on a calling of the officer's organisation, during the employer's business hours, to exercise a power under section 373.

..."

"Right to inspect and request information – authorised industrial officer

373. (1) This section applies to an authorised industrial officer who has entered a workplace under section 372.

(2) The officer may inspect the time and wages record of –

- (a) a member employee; or
- (b) an employee who is eligible to become a member of the officer's organisation; or
- (c) an employee who is a party to a QWA or ancillary document, but only with the employee's written consent.

(3) The employer –

- (a) must allow the officer to inspect the record for an employee mentioned in subsection (2)(a) or (b), unless the employee has made a written request to the employer that the record not be available for inspection by an authorised industrial officer or a particular authorised industrial officer; and
- (b) must not allow the officer to inspect the record for –
 - (i) an employee who has made a written request to the employer that the record not be available for inspection by an authorised industrial officer or a particular authorised industrial officer; or
 - (ii) an employee mentioned in subsection (2)(c), unless the employee has given written consent.

...”

Relevant provisions of the *Workplace Relations Act 1996* (Commonwealth Act) are as follows:–

“170VR Effect of AWA on other laws

- (1) Subject to this section, an AWA prevails over conditions of employment specified in a State law, to the extent of any inconsistency.
- (2) Provisions in an AWA that deal with the following matters operate subject to the provisions of any State law that deals with the matter:
 - (b) occupational health and safety;
 - (c) workers’ compensation;
 - (d) apprenticeship;
 - (e) any other matter prescribed by the regulations.
- (3) If a State law provides protection for an employee against harsh, unjust or unreasonable termination of employment (however described in the law), subsection (1) is not intended to affect the provisions of that law that provide that protection, so far as those provisions are able to operate concurrently with the AWA.
- (4) To the extent of any inconsistency, an AWA prevails over prescribed conditions of employment specified in a Commonwealth law that is prescribed by the regulations.
- (5) In this section:

Commonwealth law means an Act or any regulations or other instrument made under an Act.

prescribed conditions means conditions that are identified by the regulations.

State law means a law of a State or Territory (including any regulations or other instrument made under a law of a State or Territory), but does not include a State award or State agreement.”

“285B Investigating suspected breaches of Act etc.

- (1) This section applies if a person who holds a permit in force under this Division suspects that a breach has occurred, or is occurring, of:
 - (a) this Act; or
 - (b) an award, an order of the Commission, or a certified agreement, that is in force and binds the organisation of which the person is an officer or employee.
- (2) For the purpose of investigating the suspected breach, the person may enter, during working hours, any premises where employees work who are members of the organisation of which the person is an officer or employee.
- (3) After entering the premises, the person may, for the purpose of investigating the suspected breach:
 - (a) require the employer of the employees to allow the person, during working hours, to inspect and, if the person wishes, to make copies of any of the following that are kept by the employer on the premises and are relevant to the suspected breach:
 - (i) any time sheets; or
 - (ii) any pay sheets; or
 - (iii) any other documents, other than an AWA, an ancillary document or a document that shows some or all of the content of an AWA or of an ancillary document; and
 - (b) during working hours, inspect or view any work, material, machinery, or appliance, that is relevant to the suspected breach; and
 - (c) during working hours, interview any employees who are:
 - (i) member of the organisation of which the person is an officer or employee; or
 - (ii) eligible to become members of that organisation;
 about the suspected breach.

...”

“285C Discussions with employees

- (1) A person who holds a permit in force under this Division may enter premises in which:
- (c) work is being carried on to which an award applies that is binding on the organisation of which the person holding the permit is an officer or employee; and
 - (d) employees who are members, or eligible to become members, of that organisation work;
- for the purposes of holding discussions with any of those employees who wish to participate in those discussions.
- (2) The person may only enter the premises during working hours and may only hold the discussions during the employees’ meal-time or other breaks.”.

“83BG Appointment of authorised officers

- (1) The Employment Advocate may, by instrument in writing, appoint as an authorised officer:
- (f) a person who is appointed or employed by the Commonwealth; or
 - (g) a person who is appointed or employed by a State or Territory.
- (2) In exercising powers or performing functions as an authorised officer, an authorised officer must comply with any directions of the Employment Advocate.
- ...”.

“83BH Powers of authorised officers

- (1) An authorised officer may exercise powers under this section for the following purposes (**compliance purposes**)
- (a) for the purpose of ascertaining whether the terms of an AWA have been complied with, or are being complied with;
 - ...
- (2) The powers may be exercised at any time during ordinary working hours or at any other time at which it is necessary to do so for compliance purposes.
- (3) An authorised officer may, without force, enter:
- (a) a place of business in which the authorised officer has reasonable cause to believe that work to which an AWA applies is being performed or has been performed; or
 - (b) a place of business in which the authorised officer has reasonable cause to believe that there are documents relevant to compliance purposes; or
 - (c) a place of business in which the authorised officer has reasonable cause to believe that a breach of Part VID (AWAs) or Part XA (freedom of association) has occurred, is occurring or is likely to occur.
- (4) An authorised officer may do any of the following in a place referred to in subsection (3)
- (a) inspect any work, material, machinery, appliance, article or facility;
 - (b) as prescribed by the regulations, take samples of any goods or substances;
 - (c) interview any person;
 - (d) require a person who has the custody of, or access to, a document to produce the document to the authorised officer within a specified period.
- ...”.

Essentially the Respondents rely upon two bases in their defence of the application. In the first instance they contend that the scope of s. 372 and s. 373 of the Queensland Act should be limited primarily to the power to enter and inspect records required to be kept and to reasonably incidental purposes. Secondly the Respondents contend that irrespective of the scope of the Queensland Act provisions the Australian Parliament, has, through the Commonwealth Act evidenced an intention to cover the field in respect of right of entry by authorised industrial officers to workplaces where employees are governed by industrial instruments made pursuant to the Commonwealth Act. The Respondents thus contend that an inconsistency arises between the Queensland and Commonwealth Acts. By virtue of the operation of s. 109 of the Constitution the Respondents submit that the Commonwealth Act thus invalidates those provisions of the Queensland Act that are said to apply to employees engaged pursuant to AWAs and the workplaces where such employees work.

Scope of the Queensland Act Provisions on Right of Entry

The Respondents contend that ss. 372 and 373 of the Queensland Act do not apply in respect of employees governed by AWAs. They argue that the Queensland Parliament cannot have intended the words “any other matter” in s. 373(7) to enable an industrial officer authorised under the Queensland Act to hold discussions with federally regulated employees. In this regard the Respondents contend that s. 373(2) would not enable the authorised industrial officer to inspect the time and wages records of employees of the Second Respondent. Further given that the terms and conditions of these employees are governed by AWAs the authorised industrial officer would not be able to “discuss matters under” the Queensland Act with these employees. The Respondents submit that the reference in s. 373(7) to discuss “any other matter” with a member or eligible member should be read within the context of the powers outlined in s. 373(2) and s. 373(6). It is argued that the headings to Chapter 11, Part 1 and s. 373 of the Queensland Act support the narrow interpretation of the words “any other matter”: *Westham Dredging Co. Pty Ltd v Woodside Petroleum Development Pty. Ltd.* (1983) 66 FLR 14 at 25.

I am unable to agree with the Respondents' submission in this regard. Whilst the powers in s. 373(2) and s. 373(6) relate to specific activities that an authorised industrial officer can perform it must be noted that those activities are able to be performed by an authorised industrial officer in working time. The power to "discuss any other matter with a member employee, or an employee who is eligible to become a member" in s. 373(7) is limited to having discussions with members in "non-working time". I can find no reason to read the term "any other matter" down so that the "matter" should be reasonably incidental to inspecting time and wages records or discussing matters under the Queensland Act.

Is there any Inconsistency between the Commonwealth and Queensland Legislation on the Right of Entry?

The Respondents rely upon two arguments in advancing their case that an inconsistency arises between the two pieces of legislation insofar as the right of entry is concerned.

The first inconsistency is said to arise between the right of entry provisions in both the Commonwealth and Queensland legislation. The Respondents contend that the Australian Parliament, in legislating on the topic of industrial organisations' right of entry to workplaces, has intended to provide an exhaustive code to the exclusion of the Queensland legislation. In this regard the Respondents rely upon the "cover the field" test of inconsistency.

The "cover the field" test of inconsistency is explained in *Ex parte McLean* (1930) 43 CLR 472 at 483 where Dixon J stated:-

"It depends upon the intention of the paramount Legislature to express by its enactment, completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed. When a Federal statute discloses such an intention, it is inconsistent with it for the law of a State to govern the same conduct or matter."

The decision of the High Court in *Blackley v. Devondale Cream (Vic) Pty. Ltd.* (1968) 117 CLR 253 is illustrative of how s. 109 of the Constitution may be applied. In that decision the High Court indicated that the extent of inconsistency between a federal and state law depends on an evaluation of the intention of both laws and the extent of the Australian Industrial Relations Commission's jurisdiction.

The original *Workplace Relations and Other Legislation Amendment Bill 1996* sought to remove provisions granting a right of entry to workplaces by officials of industrial organisations and to make unenforceable award provisions relating to a right of entry. The Bill sought to replace these with a statutory right to enter only after a union member, who was an employee at the workplace, made a specific invitation in writing. The Bill was amended in the Senate after negotiations between the Democrats and the Government.

The right of entry of officials of industrial organisations are limited to those provided for in s. 285B and s. 285C of the Commonwealth Act. It is not the case that the Commonwealth Act is merely silent where the employees are working under an AWA.

The Commonwealth Act established AWAs as a mode of employment regulation. Employers and employees may enter into AWAs which are private documents approved by the Employment Advocate on the basis of the "no-disadvantage" test: see s. 170VPB – s. 170 VPD of the Commonwealth Act. Once in place AWAs generally exclude both federal and state awards or agreements: see s. 170VQ. AWAs also prevail over conditions of employment specified in state law, to the extent of any inconsistency: see s. 170VR. It is the Employment Advocate who is authorised under the Commonwealth legislation to approve and enforce AWAs: see s. 83BB.

In s. 285B of the Commonwealth Act a permit holder is allowed entry to a workplace for the purpose of investigating a suspected breach of the Act, an award, an order of the Australian Industrial Relations Commission or a certified agreement. Section 285C of the Federal Act allows entry by a permit holder to have discussions with members or eligible members where 'work is being carried on to which an award applies that is binding on the organisation'. Neither s. 285B nor s. 285C gives permit holders a right to investigate suspected breaches of AWAs. AWAs are specifically excluded from inspection by officers of industrial organisations: see s. 285B(3)(a)(iii). Further s. 285C does not entitle a permit holder to enter premises and hold discussions with members or eligible members where work is being carried on by employees who are party to an AWA.

In further support of the Respondents' argument that the Australian Parliament intended to cover the field with respect to the right of entry where employees are federally regulated I was referred to the Explanatory Memorandum to the *Workplace Relations and Other Legislation Amendment Bill 1996* by Mr Murdoch SC, counsel for the Respondents. In particular reference was made to the then proposed section 286 which provided:-

"This item proposes to repeal the current section 286 of the IR Act ... and insert two new sections in its place which deal with the preconditions for entry onto premises by organisations, for purposes connected with compliance with an award, order or certified agreement, or for purposes of discussions with employees."

One also has to consider s. 83BH of the Commonwealth Act which gives a right of entry to the Employment Advocate where AWAs are in place. If the Commonwealth had intended that not only the Employment Advocate but also industrial organisations had a right of entry where AWAs operated then I am of the view that a clear intention to do so would have been indicated. Instead it has been specific in not providing for a right of entry for industrial organisations where AWAs operate except where the entry is for the purpose of investigating a suspected breach of the Commonwealth Act. In such cases the union official should give a general indication of the nature of the breach: see s. 285B(1)(a) and decision of Merriman C in *C.F.M.E.U. v McConnell Dowell Constructors* (AIRC unreported Print No. P6606 11 November, 1997). No indication was given by Mr Harrison of the nature of any breach of the Commonwealth Act. Had Mr Harrison given such an indication then the right of entry provisions of the Commonwealth Act would have enabled him to enter the Respondents premises on 11 May, 2001 to investigate any suspected breach of the Commonwealth Act.

The scheme of industrial regulation in the Commonwealth Act allows for regulation of employment by awards and certified agreements and a corresponding right of industrial organisations to enter workplaces where awards and certified agreements operate. The scheme of industrial regulation however also allows for AWAs. Where AWAs operate the right of industrial organisations to enter workplaces is severely restricted and the general right of entry is given to the Employment Advocate. In fact employers are faced with more onerous obligations where the Employment Advocate has a right of entry.

I do not agree with the Applicant's submission that because there is no "award, order of the Commission, or certified agreement" relevant to the work being performed by employees of each of the Respondents that s. 285B of the Commonwealth Act does not apply and that s. 285B discloses no intention to specifically apply to the exclusion of any other law that might provide for right of entry.

I have formed the view that the Commonwealth Act operates to define the circumstances when a right of entry may be exercised where AWAs operate.

The second argument on inconsistency advanced by the Respondents is that where AWAs are in place then s. 170VR provides that the AWA prevails over conditions of employment specified in state law to the extent of any inconsistency.

Both Mr Swan for the AWU and Mr Murdoch SC submitted that a broad definition of "conditions of employment" should be adopted. In particular Mr Swan referred me to the High Court decision in *R v Booth and Others; Ex parte The Administrative and Clerical Officers' Association and Another*

(1978) 141 CLR 257 where the following passage from *Reg. v Findlay; Ex parte Commonwealth Steamship Owners' Association* (1953) 90 CLR 621 was accepted:-

"The 'terms' of employment are the stipulations agreed to or otherwise existing on both sides upon which the service is performed. The 'conditions' of employment include all the elements that constitute the necessary requisites, attributes, qualifications, environment or other circumstances effecting the employment."

The Respondents contend that a right of entry is thus a "condition of employment". In further support of that contention the Respondents point to the exceptions to the general provision in subsection (1) which are raised in s. 170VR(2) i.e., State laws that deal with the matters of occupational health and safety, workers' compensation, apprenticeships and other matters prescribed by the regulations.

I accept that a right of entry is a condition of employment for the purposes of s. 170VR of the Commonwealth Act. The difficulty I have is that the AWAs in operation in the Respondents' businesses do not make reference to a "right of entry" for permit holders or authorised industrial officers. Section 170VR(1) provides that the AWA prevails over conditions of employment specified in a State law, to the "extent of any inconsistency". Whilst the Commonwealth Act excludes the right of entry of an industrial organisation where AWAs operate it is not the AWA in this instance that excludes the right of entry. Thus I do not find any inconsistency between the subject AWAs and the Queensland Act insofar as the right of entry of an authorised industrial officer is concerned.

As indicated earlier I find that the Australian Parliament in the Commonwealth legislation has evidenced an intention to cover the field with respect to the right of entry of officers of industrial organisations where persons are employed pursuant to AWAs.

I dismiss the application for injunctive relief.

Order Accordingly.

D.M.LINNANE, Vice President.

Released: 12 November 2001

Appearances:-

Mr B. Swan for The Australian Workers' Union of Employees, Queensland.

Mr J.E. Murdoch instructed by Minter Ellison Lawyers for WMC Resources Limited and Eurest (Australia) Support Services Pty Ltd.

Mr I. Turner for the Australian Mines and Metals Association (Inc.) Queensland Branch.

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 125 – making, amending and repealing awards

**Queensland Nurses' Union of Employees AND Queensland Chamber of Commerce and Industry Limited,
Industrial Organisation of Employers and Others (No. B1489 of 1999)**

NURSES' AWARD – STATE

VICE PRESIDENT LINNANE
COMMISSIONER BLOOMFIELD
COMMISSIONER SWAN

14 November 2001

Application to amend Nurses' Award – State – Re-establishment of common rule nature of the Award – expansion of the classification structure for Registered Nurses – Removal of exemption from hours provision for full-time registered nurses working in boarding schools – Whether value of work performed by registered nurses employed in boarding schools and specialist medical centres is equivalent to the value of work performed by registered nurses in the hospital setting – Current classification structure of registered nurses employed in boarding schools generally appropriate – Value of work by registered nurses employed in specialist medical centres is equivalent to that of registered nurses in hospital setting – Amendment of classification structure for registered nurses employed in specialist medical centres granted – Amendments from "boarding schools" to "independent schools", "Nurse Registering Authority for Queensland" to "Queensland Nursing Council", "Guaranteed Minimum Wage" to "Queensland Minimum Wage" – all other proposed amendments referred to conference.

DECISION

This is an application by the Queensland Nurses' Union of Employees (QNU) to amend the *Nurses' Award – State* in a number of respects. Essentially the amendments sought by the QNU which were opposed by the various Respondents can be summarised as follows:-

- (i) the re-establishment of the common rule nature of the Award;
- (ii) the expansion of the classification structure from Registered Nurse Level 1 Grades 1 – 4 to the full registered nurse classification structure found in other nursing awards of this Commission. i.e. Registered Nurse Level 1 Grades 1 – 8 and Registered Nurse Levels 2 – 5. In particular this expansion is sought in respect of registered nurses employed in Doctors' Rooms and Boarding Schools; and
- (iii) the removal of the exemption from the hours provision for full-time registered nurses working in boarding schools.

The application is opposed by the Queensland Government, the Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers (QCCI), the Queensland Catholic Education Employing Authorities (QCEA), the Grammar Schools, the Presbyterian/Methodist Schools Association (PMSA), the Queensland Anglican Schools (QAS) and the Lutheran Schools.

Claim in respect of the Application Clause

The QNU seeks to amend the application clause of the Award (clause 1.2) to re-establish the common rule nature of the Award. The current Award Coverage clause in the Award (clause 1.2) provides as follows:-

"This Award shall apply to all nursing staff employed by Industrial and Commercial Establishments, Local Government Authorities, Doctors, Creches and Kindergartens, Boarding Schools and Pathology Laboratories:

Provided that this Award shall not apply to employees covered by any other Award or Industrial Agreement, or who are members of a religious Order.”.

The QNU seeks to amend that clause to provide as follows:–

“This Award shall apply to all nursing staff employed in the following:

- non-institutional health settings including Industrial, Commercial and Retail Establishments
- Local Government Authorities
- Doctors Surgeries
- Creches and Kindergartens
- Independent Schools
- Pathology Laboratories
- Nursing Agencies:

Provided that an employee of a nursing agency shall be entitled to be paid in accordance with the instrument that covers the establishment in which the employee is placed by the agency:

Provided further that the rate of pay shall not be less than that provided for in clause 3.3 (Wages) of this Award.”.

The Queensland Government has sought an amendment to the proposal to ensure that the Governments interests are protected. The Queensland Government proposed two alternative amendments to the Award Coverage clause. Whilst the QNU did not seek to amend its application to accommodate the Queensland Government’s position it did indicate a preference to the following Queensland Government proviso to the Award Coverage Clause (clause 1.2):–

“Provided that this Award shall not apply to employees employed by a Queensland Government entity as defined under the *Public Service Act 1996* if that employee is covered by a Queensland industrial instrument or to employees of the Mater Misericordiae Public Hospital covered by another award and employees who are members of a religious Order.”.

The QNU objects to the term “industrial instrument” being used in the proviso given the definition of that term in the Act.

We have decided to essentially adopt the Queensland Government’s proposed amendment to the QNU’s claim in this regard. Because of the breadth of the term “industrial instrument” we are prepared to replace that term in the Queensland Government’s proposal with the words “award, certified agreement or industrial agreement of this Commission or an award or certified agreement of the Australian Industrial Relations Commission”.

Claim in respect of the Classification Structure

In 1992 a Full Bench of this Commission introduced into the Award professional rates for the registered nurse classification. However in so doing it inserted into the Award a truncated classification structure so that registered nurses employed in Doctors’ Rooms and Boarding Schools only have access to Registered Nurse Level 1 Years 1 - 4. They have no access to Registered Nurse Levels 2 – 5.

The QNU in this application seeks to have the full range of professional rates for registered nurses incorporated into the Award. The classification structure sought by the QNU is as follows:–

- Registered Nurse Level 1: Grades 1 – 8
- Registered Nurse Level 2: Grades 1 – 4
- Registered Nurse Level 3: Grades 1 – 4
- Registered Nurse Level 4: Grades 1 – 3
- Registered Nurse Level 5: Grades 1 – 6

The QNU also seeks to have incorporated into the Award the generic level statements for each classification level.

Claim in respect of the Exemption from Hours of Work Clause

Clause 4.1(4) of the Award currently provides as follows:–

“In view of the extra holiday occasioned by school vacations, the hours of full time nursing employees in boarding schools shall not be limited, and the provision of clause 2.2 of this Award shall not be applicable in so far as the time portion of the time and wages book is concerned.”.

Clause 2.2 Time and Wages Book currently provides as follows:–

“Except as provided in subclause (3) of clause 4.1 hereof, a time and wages book shall be kept by every Employer showing the name and status of every employee subject to this Award, their starting and finishing time, time worked on each day and the wages, including overtime (if any) paid, and such time and wages book shall be available for inspection during business operations by a duly authorised official of the Queensland Nurses’ Union of Employees.”.

The QNU application seeks to remove the exemption currently found in subclause 4.1(4) of the Award for full-time nursing employees employed in boarding schools.

Evidence

In determining this matter we have considered all of the evidence adduced in the course of the hearing. In summary the evidence relied upon by the QNU in support of its claims is as follows:–

Lex Laurance Oliver, a registered nurse and Professional Officer for the QNU (Exhibit 16). In the course of his employment with the QNU Mr Oliver has had considerable involvement with the Generic Level Statements developed for the establishment of the Nurses’ Career Structure within the extended classification structure in nursing awards generally. Mr Oliver advised the Bench as to the theoretical basis underlying the nursing classification structure and the generic level statements found in many awards of both this Commission and the Australian Industrial Relations Commission. Mr Oliver also referred to the ANCI competencies stating that all registered nurses were required to maintain those competencies. It

was the evidence of Mr Oliver, based solely on the information contained in various Affidavits relied upon by the QNU, that the duties and responsibilities undertaken by some witnesses appeared to fall into classifications not currently provided for in the Award.

Gayle Julia McCaul, a Research Officer with the QNU (Exhibit 23). Ms McCaul assisted in the preparation of a survey that was distributed to nurses working in independent schools. Ms McCaul prepared a report using the data collected from the survey (Exhibit 24). A similar survey was undertaken by the QNU of members working in doctor's surgeries. Ms McCaul also prepared a report from the data collected from the survey of members employed in doctor's surgeries (Exhibit 25).

Catherine Mary Burke, a registered nurse currently employed at St. Joseph's Nudgee College as its Health Centre Co-ordinator (Exhibits 18 and 19). Ms Burke has been employed in that position since 1997. At the time of giving evidence the College had approximately 1,400 students including 440 boarders and 300 staff. The Health Centre also tends to a retired Brothers community of 6 persons and 250 students enrolled at the International School. The Centre has six permanently employed part-time registered nurses with a further two registered nurses available for relief work. Ms Burke is the only full-time nursing employee. The Centre has a registered nurse on duty at the Nudgee Campus 24 hours per day, 7 days a week throughout the school year. Ms Burke gave evidence of the additional hours she is required to work beyond the 76 hours for which she is paid. It was the evidence of Ms Burke that throughout the year 2000 a registered nurse was rostered from 10.00am on Sundays through to 7.30am on Mondays i.e. a total of 21.5 hours. Further Ms Burke informed the Full Bench of the duties performed by her and responsibilities associated with her employment as the Health Centre Co-ordinator.

Ms Burke gave examples of the hours that registered nurses at the College are sometimes required to be on duty e.g. a registered nurse who was asked to be on campus for 45.5 hours and was only paid for 31.5 hours and a registered nurse who was expected to be on campus for 50.5 hours over 4 days and was only paid for 31.25 hours. According to Ms Burke in those two instances a total of 33.25 hours of nursing care was provided with no payment. Further Ms Burke said that nurses should be compensated for the actual hours worked.

Gary Mellor, a registered nurse who is currently employed as a Sessional Tutor and Research Assistant at Griffith University (Exhibit 17). Mr Mellor is currently conducting research into the role of Occupational Health Nurses in Australia. Mr Mellor's evidence went to the fact that he had examined the Generic Level Statements contained in various nursing awards of this Commission and he had formed the opinion that the roles and responsibilities required of registered nurses working within the occupational health sector were consistent with the registered nurse level 1, 2 and 3. This was the only evidence adduced by the QNU on the role and responsibilities of registered nurses employed in the occupational health sector. It should be noted that currently occupational health nurses have an ability to access the Registered Nurse Level 1 up to the 8th year of service.

Shayle Woods, a registered nurse currently employed at the Sunshine Coast Private Hospital (Exhibit 20). Between January 1998 and February 2000 Ms Woods was employed as a full-time registered nurse at the Anglican Church Grammar School at East Brisbane at the School's Health Centre. At the time the School had 1,300 day students and 250 boarding students. Ms Woods lived on the School premises during her employment occupying a flat located underneath the health centre. In the first year of her employment at the School Ms Woods says that she was required to be on School premises for 103 hours per week with her shift running from 12.00 noon on Mondays and continuing until 12.00 noon on Saturdays. She was allowed to be off School premises for two 8 hour periods on Tuesdays and Thursdays. Ms Woods asserted that whilst the Health Centre's operating hours were 7.00am to 7.00pm Monday to Sunday she was required to be on the School premises for 103 hours per week. In her second year of employment the hours that Ms Woods was required to be on the premises reduced from 103 hours per week to 78 hours per week. During the course of her employment with the School Ms Woods received no overtime payment for any work done outside 38 hours per week. Ms Woods not only gave evidence of the duties she performed as the Charge Nurse but she also advised the Bench of the duties performed by other registered nurses at the Health Centre.

Jane Marr, a registered nurse who was employed by Queenstate Nursing Agency (Exhibit 21). Ms Marr was previously employed by the Water Gardens Family Practice on a casual basis where she was paid as a Level 1 registered nurse on pay-point 4 performing theatre nurse work. During the course of her employment at the Family Practice Ms Marr was able to negotiate an over-award payment. Ms Marr's evidence went to the types of operations carried out at the Family Practice and the duties that she performed at the Practice. Ms Marr also gave evidence of her previous employment at the Ashbury Cosmetic Surgery and Vein Centre where she worked from early 1998 to September 1999 and the duties that she performed in that employment. It would appear that Ms Marr has been required to assist in rather complex surgical procedures and has been required to attend a hospital to assist whenever a member of the practice was performing surgery.

Tammy Dianne Jacobsen, a registered nurse who is currently employed at the Ipswich Medihelp on a casual basis having previously been employed on a full-time basis (Exhibit 22). Prior to her employment at Ipswich Medihelp Ms Jacobsen had worked at the Ipswich Grammar School on a casual basis averaging 16 hours per fortnight. Ms Jacobsen's evidence went to the structure of Ipswich Medihelp, the staffing levels and the duties she performed particularly when she was employed in a full-time capacity. At the time that Ms Jacobsen was employed at the Ipswich Grammar School the School had 900 students of which approximately 100 were boarders and the School had 100 staff. The Health Centre employed one registered nurse who worked as a nurse supervisor on a full-time basis Monday to Friday and 4 casual registered nurses who worked on weekends. These casual nurses were sometimes required to be on-call according to Ms Jacobsen. Ms Jacobsen said that whilst she was not paid any on-call allowance she was expected to be on-call and take the telephone home after she completed a shift. Her evidence was that she was sometimes called after hours by students, staff or parents for advice on a range of issues. The Health Centre contained a five bed overnight facility for students who were ill.

Phillipa Ann Hann, a registered nurse who was employed from 1989 until November 2000 as the college Matron at St Ursula's College, Toowoomba (Exhibits 26 and 27). According to Ms Hann at the time of her resignation from the College there were 700 students of which approximately 170 were boarders. The College had an infirmary consisting of a 10 bed ward. There was a flat located in the infirmary for Ms Hann to stay in when she was required to maintain observation on any student required to remain in the infirmary overnight. Ms Hann was the only registered nurse employed by the College and whilst the hours that she was required to provide nursing care were 7.30am to 5.30pm Monday to Friday there were many times that she was called after those hours although she was not officially on-call. Ms Hann was paid as a Registered Nurse Level 1 Year 4. She also received a \$200.00 payment when required to sleep overnight in the infirmary. She received no overtime payments and no on-call allowance. Ms Hann advised the Full Bench of the duties she performed and the responsibilities undertaken by her as College Matron.

Christopher Van Genderen, a registered nurse currently employed as such on a part-time basis at the Health Centre at the Brisbane Boys' College (Exhibits 28 and 29). The College has 1,500 students of which 140 are boarders and a staff of 200. The Health Centre offers medical aid to all students and to staff and their families who live on the College premises. The Health Centre contains an 8 bed ward and there is a flat upstairs for the resident nurse. There are two registered nurses working at the Health Centre. The charge nurse works from Tuesday morning until Saturday morning with normal hours being 8.00am to 6.30pm. Mr Van Genderen commences work on Saturday mornings at 8.00am and leaves at 6.30pm on Saturdays. On Saturday evenings and Sundays Mr Van Genderen says that he is contactable by mobile telephone and if required will return to give treatment or arrange for the admission to hospital of a student. Mr Van Genderen returns to work between 6.00pm and 8.00pm on Sunday evenings

and then he sleeps over on the Sunday evening on a sofa bed in the front interview room of the Health Centre. He works a minimum of 10 hours on a Monday and sleeps over on the Monday evening. He also works on the charge nurse's accumulated day off. Mr Van Genderen advised the Full Bench of the duties he performed, the responsibilities undertaken in the role of registered nurse at the Health Centre and the nature of the matters that the registered nurse is required to attend to in the position. The terms and conditions of Mr Van Genderen's employment with the College are governed by a Queensland Workplace Agreement entered into in mid 1999.

Stacey Ann Carroll, a registered nurse who has worked in various medical centres, the last of which was the Strathpine Seven Day Medical Centre during the period March 1999 to September 2000 (Exhibit 30). Ms Carroll advised the Full Bench of the duties that she performed and the responsibilities she accepted at the Strathpine Centre whilst employed in a full time capacity. In particular, Ms Carroll gave evidence as to the supervisory nature of her position, being responsible for staff rostering, the ordering of stock and the ordering of vaccines. According to Ms Carroll she had responsibility to manage staff vacancies and contingencies as they arise. Ms Carroll said that she was on call after hours should any of the nursing staff require assistance.

The evidence for the various Respondents is summarised as follows:-

Roger David Buttenshaw, the Deputy Headmaster of Toowoomba Grammar School (Exhibit 31). At the time of giving evidence the School had 851 students with 318 of those being boarding students, 63 teaching staff and a similar number of other staff. All staff at the School are employed pursuant to the *Toowoomba Grammar School Certified Agreement 2000*. According to Mr Buttenshaw the Health Centre at the School provides first-aid and medical and allied health referrals and whilst the service is mainly provided for boarders it is also available to day students. It was Mr Buttenshaw's view that the Health Centre was really a "sick bay" rather than a medical centre. The Medical Centre consists of a six-bed ward, a two-bed isolation ward, clinic room, office and doctor's consulting room. The Medical Centre employs two full-time registered nurses and one casual nurse.

A fully furnished flat is provided for the full-time nurse on duty in the Centre. One full-time nurse works Monday, Wednesday and Friday on one week and then Tuesday, Thursday and Saturday the following week. The other full-time nurse works the alternative days. The full-time nurses are on the premises for 24 hours. The casual nurse is employed from Sunday 9.00am to Monday 9.00am. The School deducts from the salary of those full-time registered nurses an amount of \$54.80 per fortnight for board and lodging during school terms. Overnight accommodation is also available for the casual nurse although no board and lodging amount is deducted.

The School also engages additional Sports Injury Nurses and Ambulance Officers during football training and match days. The full-time nurses are employed on a continuing basis throughout the year although they are not required to be on duty at the School during the School vacation periods. In 2001 the School will be open approximately 37 weeks. Thus the nurses will not be required to be at work for approximately 15 weeks in the year. That is far in excess of the five weeks' annual leave entitlement provided for in the Award.

In particular Mr Buttenshaw saw the removal of the hours' exemption for boarding school nurses and the extension of the Level 1 Nurse salary scale from 4 to 8 levels as creating a financial burden on providers of boarding schools.

Mr Buttenshaw advised the Commission that the nurses in the Health Centre were required to manage the Health Centre budget allocated each year.

Steven Jon Hambleton, executive director of Foundation Medical Centres Queensland Pty. Ltd. (Foundation MCQ) (Exhibit 32). This organisation operates fourteen medical centres across Queensland providing facilities and services to medical practitioners. Foundation MCQ is a wholly owned subsidiary of Foundation Healthcare Limited which operates 129 medical centres in Australia. At the time of giving evidence Dr Hambleton advised that Foundation MCQ had recently merged with MediHelp and this added another 27 practices in Queensland. Foundation MCQ employs 56 registered nurses, 11 enrolled nurses and 11 assistants in nursing plus clerical staff to approximately 127 doctors in Queensland (not including the MediHelp practices). Foundation MCQ does not provide services to patients but rather services to general medical practitioners. Dr Hambleton gave evidence of what he saw as the difference in the work performed by a nurse in a hospital or acute setting and a nurse in a medical practice. According to Dr Hambleton the nurse in the medical practice is not responsible for a patient's care – the doctor is responsible and the nurse is merely assisting with the care that the doctor wishes the patient to receive. The acuity of patients presenting at medical centres as compared to those presenting at hospitals was not as high and the complexity of cases was much lower in Dr Hambleton's opinion.

According to Dr Hambleton the nurse in a medical practice makes no clinical decisions and has no relationship with the patient. In contrast the nurse in the hospital environment is in charge of the care of the patients, producing nursing care plans, diets, wound care plans and is assessing patients on an ongoing basis. Dr Hambleton said that nurses in medical practices have no opportunity for a nursing career path as they report to practice managers who do not need to be medically trained with those practice managers reporting to area managers who also do not need to be medically trained.

Michele Brown, Practice Manager at the Strathpine Seven Day Medical Clinic – a clinic purchased by Foundation MCQ in September, 2000 (Exhibit 34). Ms Brown confirmed that Ms Carroll managed the treatment room, inducted and trained new nursing staff, rostered nursing staff, ordered equipment and stock as well as partaking in management projects such as contributing articles for the Policy & Procedures Manual. At the time of Ms Carroll's employment there were six or seven nurses employed at the Clinic. It was the evidence of Ms Brown that Ms Carroll was not required by management to be available out of hours but rather Ms Carroll herself asked staff to contact her out of hours should problems or issues arise. Ms Brown gave evidence of one instance of where she contacted Ms Carroll out of hours. Whilst suggesting that Ms Carroll was the initiator of her being on call out of hours she did confirm that this policy was reinforced by the previous management of the Clinic.

Michael Senior, the Acting Principal of St Joseph's Nudgee College (Exhibit 37). During the course of his employment at Nudgee College Mr Senior has had substantial responsibility for the operation of the Health Centre at the College. According to Mr Senior the Health Centre was established to cater for the health needs of the College community – it is available to all students and staff members. The College employs a full-time registered nurse and that person is on-call 24 hours per day, 6 days per week. Wednesday is the rostered day off and on Sundays the registered nurse is "on call" and need not be on campus. In addition, the College employs four part-time registered nurses to provide assistance and relief to the full-time registered nurse. These nurses are on duty each evening of the week with their normal hours being 2.00pm to 8.00pm. A sleep-over suite is available for the part-time nurses and they are able to retire to bed during the night. They resume duty on the following morning prior to being relieved by the full-time nurse. The part-time nurses are not required to be on duty or to remain awake during the night. The College does not pay for the sleeping time.

According to Mr Senior the "on-call" arrangement referred to by Ms Burke is not one that is required by the College but rather Ms Burke has set the arrangement in place herself. It was Mr Senior's evidence that the registered nurses were not required by the College to work beyond their rostered time. In addition to the nursing staff at the Health Centre the College employs four trained counsellors who have responsibility for the counselling of students.

Mr Senior indicated that the College had paid an on-call allowance to the registered nurses up until the end of 2000 and had in 2001 introduced a 15% loading in recognition that on-call work was being performed. This was paid notwithstanding that there was no provision in the Award for any on-call payment.

Susan Maree Flood, the College Principal of St Ursula's College at Toowoomba (Exhibit 39). Sr Flood acknowledged that there had been significant change in the role of the registered nurse at the College since 1991. In cross-examination Sr Flood elaborated on those changes including the greater focus on liability and regulation (the enactment of the *Nursing Act 1992* and the *Health (Drugs and Poisons) Regulations 1996*), the increase in concern of students in the area of sexual health and depression and the use of illicit drugs. These changes meant that the registered nurse was required to ensure that they had the necessary skills to meaningfully discuss such matters with the students. The infirmary at the College was established to cater for the health needs of boarding students although at times the registered nurse can be called on to assist a day student who is sick at school or if an emergency situation arises. The infirmary consists of a ten bed sick bay, a consultation room and examination room and a small flat with ensuite, bathroom and kitchenette. It is located in one of the boarding house buildings. The hours of duty of the registered nurse are 7.30am to 5.00pm Monday to Friday. When Ms Hann was employed at the College she was paid for 52 weeks of the year but was required to work only the weeks of the school term i.e. approximately 40 weeks per year. According to Sr Flood the students who stayed in the infirmary were usually there because they needed a couple of days of bed-rest and monitoring. If a student was sick enough to need up to a week in bed then generally they would go home to be cared for by their parents. If the student's home was in some isolated region or their parents were overseas then they may stay in the infirmary for a longer period. In other cases students were hospitalised. Another staff member (not a registered nurse) supervises students who need to be in the infirmary over night.

There was an arrangement between Ms Hann and the College whereby she was on-call for emergency situations. According to Sr Flood it was rare, if ever, that Ms Hann was called in out of hours. At times she was telephoned out of hours to check on a course of action to be taken with a student. Generally however if a student was sick after hours then a doctor was contacted.

According to Sr Flood the College Nurse was required to make basic diagnoses of minor injuries and illnesses and to discern whether a student needed to be seen by a doctor for further diagnosis and treatment. If the student was required to be seen by a doctor then thereafter the nurse would administer care according to the doctor's instructions.

Richard Edwin Horder, Business Manager, Ipswich Grammar School (Exhibit 41). The School has 721 secondary students and 97 primary students of which 80 are boarding students. There are 150 staff employed at the School. In the past five years there had been a dramatic drop in the numbers of boarding students at the School falling from 162 to just 80. According to Mr Horder this decline has been the result of increased operating costs of boarding houses and the support facilities, including the dining room/kitchen and the Medical Centre, which are required in boarding establishments.

All staff employed at the School are employed pursuant to the terms and conditions contained in the *Ipswich Grammar School Certified Agreement 2000*. The salary received by the nurses as a result of the *Certified Agreement* is in excess of the top of the salary scale of the Level 1 nurse being sought in this application. Mr Horder has responsibility for the overall management and co-ordination of routine and emergency health care for both students and staff through the School Health Centre. The Centre provides nursing care and on-going medical and allied health referrals particularly for boarding students. The Centre consists of a 5 bed ward area, clinic room and office. An unfurnished flat is provided for the full-time nurse which is located close to the Centre. An amount of \$54.78 per week is deducted from the salary of the nurse for such board and lodging. Overnight accommodation is available for other staff employed on a casual basis.

There are four registered nurses employed at the centre including a full-time staff member and three casual nurses. The full-time nurse is responsible and accountable for the overall management and co-ordination of routine and emergency health care to the School community. Mr Horder's evidence went to the duties and responsibilities of the registered nurses on staff and he referred to the typical services provided by those nurses. On sporting days the School arranges for the Queensland Ambulance Service to have at least one ambulance and two ambulance officers at the ground.

The Centre, according to Mr Horder, provides a 24 hour service for boarders. The full-time nurse supervisor works five days per week Monday to Friday during the period 8.00am to 6.00pm. That nurse remains on call overnight and is located on campus during that time. The casual nurses are required to work on Saturdays and Sundays and are generally not required to remain on campus overnight. They are, however, on call and in emergent circumstances they may be required to sleep over.

The full-time nurse is paid for 52 weeks per year yet she is required to be on duty only during the School terms. In 2001 the School Health Centre is anticipated to be open for approximately 38 weeks. Thus the nurse is not required to work on 14 weeks in the year.

Mr Horder agreed that the duties outlined in the three position descriptions attached to his Affidavit were performed by the nurse-in-charge at the School. Mr Horder also acknowledged that the School had reached agreement concerning the implementation of any change that may arise from this decision. Mr Horder advised the Commission of the changes that had occurred at the School over the last 10 years including the introduction of younger students (boarding and day), attention deficit disorder and the medications used to treat that disorder, and the increase in illicit drug use.

Jill Trounce, the General Manager of MediHelp General Practice Ltd (Exhibit 43). Ms Trounce's evidence was in response to that of Ms Jacobsen. Ms Trounce said that it was not a requirement of a Lead Nurse to be available after hours. Ms Jacobsen chose to make herself available to staff out of hours. Ms Trounce confirmed that it was the responsibility of the Lead Nurse to ensure that the staff roster was maintained. MediHelp has an on-call list of nurses available and sometimes it is necessary to phone many nurses before one is located. It is also the responsibility of the Lead Nurse to ensure that the rostered nursing staff are proficient and that the doctors' needs are met competently. Whilst it is not the responsibility of the Lead Nurse to provide the education it is her responsibility to direct the nursing staff to further training if that is required. Ms Trounce conceded that Ms Jacobsen did organise for providers of training to come to the Centre at times and provide that training to the nurses. The Lead Nurse is also responsible for that part of the Centre budget that directly relates to the Treatment Rooms. Ms Trounce also gave evidence of the duties and responsibilities of the Lead Nurse and how these were identified in the Lead Nurse Job Description.

During the course of Ms Trounce's evidence she referred to the role of the Clinical Nurse Adviser employed by MediHelp. The Clinical Nurse Adviser provides advice to the operations manager on clinical matters. At the time of giving evidence MediHelp employed approximately 81 registered nurses and 50 enrolled nurses. The Clinical Nurse Adviser works as a casual registered nurse at the Beenleigh MediHelp for 20 hours per week. For this work she is paid the normal hourly rate of \$16.13 per hour i.e. the Level 1 Year 4 Award rate of pay. In addition she is paid a bonus of \$1,000 at the end of each six months for her Clinical Nurse Adviser role. In her role as Clinical Adviser for the whole of the MediHelp group she is required to be contactable at all times. She provides the approximately 50 enrolled nurses with clinical advice and is often the "direct" or "indirect" supervisor of enrolled nurses required by the Queensland Nursing Council under its Scope of Nursing Practice. When looking to fill the position of Clinical Adviser Ms Trounce states that MediHelp was looking for a registered nurse with extensive experience in a variety of settings.

Alan Robert Ball, Director of Boarding at Brisbane Boys' College (Exhibit 45). Mr Ball's evidence was directed to the evidence of Mr Van Genderen. The College has 1,450 students of which 142 were boarders and 170 staff. He agreed that Mr Van Genderen's employment was the subject of a Queensland Workplace Agreement (QWA) and that his hours of duty under that Agreement were 8.00am to 6.30pm on Mondays, 8.00 to 6.30pm on Saturdays, 6.00pm to 8.00pm Sundays, 8.00am to 6.30pm on the Resident Nurse's ADO each month and he is on call overnight on Saturday, Sunday and Monday evenings. The Resident Nurse's hours of work are 8.30am to 6.00pm Tuesday to Friday which include a 40 minute unpaid meal break per day. The Resident Nurse's terms and conditions of employment are also governed by a QWA. According to Mr Ball it is not the intention of the College that the Health Centre provide any sort of comprehensive health care solution for students with any significant medical treatment being attended to off-campus. Mr Ball stated that if Mr Van Genderen was on call or sleeping over at the Health Centre he may well be required to deal with boarders suffering from viral complaints causing vomiting or diarrhoea or students with high fevers where he would be required to monitor the student's progress. According to Mr Ball at times of epidemics such as influenza the College has a policy of hiring locum nurses to assist in the workload.

Mr Ball also gave evidence as to the position with respect to Somerville House which has 1,030 students with 105 of them being boarders. There is a full-time nursing position worked from 8.30am to 5.30pm which is job-shared between two registered nurses. Any out of hours emergencies are referred to the Mater Hospital.

According to Mr Ball Clayfield College has an enrolment of 748 students with 105 of them being boarders. There is no nurse employed by Clayfield College with medical issues being dealt with initially by the Student Services Officer.

Raylene Steinhardt, an enrolled nurse employed as the Lead Nurse at MediHelp at Ipswich (Exhibit 46). Ms Steinhardt's evidence purported to comment on the role of the registered nurse in the hospital setting as compared to the medical setting. She has never been a registered nurse and her experience in hospital settings is limited to when she attained her enrolled nurse certificate in 1991 and a period at the Spinal Unit of the Princess Alexandra Hospital in 1995. Ms Steinhardt gave evidence of the duties she undertakes in the position of Lead Nurse. Included amongst these duties was the rostering of the other enrolled nurses, responsibility for the medical consumables part of the Centre's budget, giving instructions to other enrolled nurses as to correct procedures and the orientation of the nurses which involves three days of training.

Elizabeth Fischer a registered nurse at Nurseworldwide Agency (Exhibit 47). Ms Fisher last worked in a medical centre in 1994 as a casual at the Holland Park Medical Centre. It was Ms Fisher's opinion that the claim by the QNU for Levels 1 to 5 registered nurses did not reflect the levels of skill and expertise that was required in a medical centre. It was her evidence that the work in a medical centre was less complex, less diverse and less stressful than the work performed by nurses in the hospital setting. It was also her view that the supervisory responsibilities of a Clinical Nurse in the hospital setting could not be compared with the supervisory responsibilities of a nurse in a medical centre when one looks at the numbers of nurses being supervised. Ms Fischer's comments in respect of a Clinical Nurse are, according to her evidence, based on observations of the Clinical Nurse in the hospital setting. It is noted however that she was employed as a Clinical Nurse in the Urology Unit at Royal Brisbane Hospital for 12 months in 1999 and in Accident & Emergency in the early 1990's.

Boarding Schools

In *Queensland Nurses' Union of Employees AND Queensland Confederation of Industry Limited, Union of Employers and Others* (1992) 140 QGIG 758 a Full Bench stated:-

"From our examination of the relevant material, it is our view that boarding school nurses would be required to have a similar base of knowledge to hospital nurses although there is little evidence that boarding school nurses update that knowledge. Further, the range of skills exercised by boarding school nurses is less significant. In addition, the environment in which boarding school nurses function is totally different to that of a hospital or nursing home. We would agree there is less pressure in a boarding school, however, the role of a boarding school nurse is quite different to those found in other areas of nursing employment..."

Consideration has been given to the information presented to the Commission by way of inspection and evidence. We agree with the submissions of the QNU to the extent that, where an employer chooses to employ a registered nurse, then rates determined for such nurses are to apply.

In all of the relevant circumstances, we have determined that the first four pay points of Level 1 are to apply to nurses engaged at boarding schools."

The evidence before us indicates that registered nurses employed in boarding schools are generally working by themselves. As registered nurses they are required to work within the Scope of Nursing Practice established by the Queensland Nursing Council. The evidence would suggest that registered nurses employed in boarding schools have many years of experience in nursing. Such registered nurses are employed to not only perform the routine tasks required of a nurse in a boarding school but also they must have the skills and qualifications necessary to deal with more complex clinical matters and emergencies which arise. Unlike the registered nurse in a hospital setting, the registered nurse in the boarding school will often not have the assistance of a medical team in the early stages of the complex clinical matter or the emergency. It is in these circumstances that experience in the field of nursing is of great benefit. Whilst we are not convinced that complex matters or emergencies are a regular facet of the boarding school nurse it is the training and experience of the registered nurse that is particularly relevant when the abnormal occurs. This is similar to other professionals. We also accept that the theoretical basis underlying the generic level statements mean that registered nurses' skills are transferable from setting to setting.

The material before us however does not support the argument that the value of work performed by registered nurses employed in boarding schools is generally equivalent to the value of work performed by such persons in the acute hospital setting. We are of the view that the current classification structure of Registered Nurses Level 1 Grade 1 - 4 is appropriate. We thus dismiss that part of the QNU application which seeks to extend the Level 1 classification structure for registered nurses employed in boarding schools.

There is evidence before us however that some registered nurses in boarding schools have some supervisory aspects to their employment. Whilst not making any determination on whether any particular registered nurse is performing duties consistent with a Level 2 or Level 3 registered nurse we are prepared to extend those classifications to the registered nurses employed in boarding schools. We are also prepared to insert the Generic Level Statements for Registered Nurse Level 1, Level 2 and Level 3 into the Award.

Currently there is an exemption in the Award from the payment of overtime to registered nurses employed in boarding schools. The QNU's claim is for payment of all Award benefits to such nurses where they work in excess of 38 hours per week. We accept that the hours that full-time registered nurses in boarding schools are required to be on duty or to be on-call can sometimes be rather lengthy and well in excess of 38 hours in a week. We also acknowledge however that many full-time registered nurses are employed throughout the whole year whilst only performing duties during school terms i.e. the weeks that the registered nurse is not required for duty can be up to 15 weeks in a year. This far exceeds the five (5) weeks' annual leave arrangements in the Award. We do not believe it to be appropriate that a registered nurse should gain the benefit of being paid for every hour that they are on the school premises or on call and also have the benefit of up to 15 weeks' leave per year.

We are however prepared to give parties the option of either receiving payment for all time worked and/or time spent on call or alternatively of being employed on an annual basis and working for the school terms only. We will refer this back to the parties for Conference before Commissioner Bloomfield to see if agreement can be reached on the terms of an award clause reflecting our determination, including the terms of an on-call provision.

Medical Centres

In *Queensland Nurses' Union of Employees AND Queensland Confederation of Industry Limited, Union of Employers and Others* (1992) 140 QGIG 758 the Full Bench of this Commission stated:-

"The question of whether medical practices employ registered nurses is a matter for those employers to determine having regard to a range of factors including the type of patients treated and the range of patient care services they wish to provide. We are of the view that if doctors wish to employ nurses in their practices, then the rates paid to such nurses should be consistent with those paid to nurses in other sectors of nursing employment. Upon our assessment of the oral evidence before us concerning the value of work undertaken, we are only prepared to award the first four pay points of level 1 to nurses employed in doctors' rooms.

... it may be that the types of skills required to be exercised by nurses in certain medical practices, especially specialist practices, may be more complex than those which have been presented through oral evidence to this Commission. Other than the limited information shown in the job advertisements as exhibited, the Commission has no material before it upon which it can make a realistic assessment of the duties and skills that may be required to be performed by registered nurses in the type of medical practices to which reference was made earlier. Accordingly, we decline to award more than the four first pay points of Level 1 for registered nurses employed in doctors' rooms at this stage."

The evidence before us supports the QNU proposal that there is the potential for registered nurses to be employed in general practice type medical centres in supervisory levels e.g. Lead Nurse and Clinical Nurse Adviser. We are prepared to insert into the Award Registered Nurse Level 2 Grade 1 and 2 and Level 3 Grade 1 and 2. We have not made any assessment as to whether the work performed by any witness corresponds with either of those two classifications. That is a matter for negotiations and if necessary determination by the Commission on an application and/or dispute notification. We are also prepared to amend the Award so that the Generic Level Statements of Registered Nurse Level 1, Clinical Nurse Level 2 and Clinical Nurse Consultant and Nurse Manager Level 3 are incorporated into the Award in respect of Doctors' Rooms.

Currently the Registered Nurse Level 1 classification is limited to Grades 1 to 4. Like the members of the Full Bench in B198 of 1991 we have formed the view that the value of the work undertaken by Level 1 registered nurses employed in doctors' rooms does not equate to the value of the work performed by such registered nurses in the more acute hospital settings. On the evidence before us we are unable to accede to the claim to extend the Registered Nurse Level 1 classification in so far as the traditional doctors' rooms are concerned.

The role of the doctors' room has however, in a number of instances, changed over the last ten years or so. There has been the introduction of cosmetic surgery clinics and the like where quite complex procedures are undertaken and where nurses can spend considerable time assessing and preparing patients. The evidence before us of the work performed by registered nurses in specialist medical practices where surgery, once performed in hospitals, is now performed on a day surgery basis enables a distinction to be made between the value of the work performed by registered nurses in the general practice type of medical centre or doctors' rooms and the specialist medical centre. In our view the value of work performed in specialist medical centres is much more akin to the value of work performed by the registered nurse in the hospital setting. In our view the QNU has made out its case for such Level 1 registered nurses in those settings to have access to Grades 5 and 6 of the Level 1 classification structure.

The definition of a specialist medical centre is something that we would ask the parties to confer on with the assistance of Commissioner Bloomfield.

Occupational Health

We have formed the view that there was insufficient evidence before us to warrant an amendment to the two stage classification structure for occupational health nurses currently in the Award. Occupational health nurses currently have an ability to access the Registered Nurse Level 1 up to the 8th year of service.

Other Amendments

The QNU also seek other amendments to the Award. These amendments have been incorporated in a draft award found in Exhibit 12 in these proceedings. Most of the amendments sought have merit although we note that some Respondents have taken objection to aspects of these amendments. Some of the substantive amendments sought by the QNU include the insertion of:-

- a Union Encouragement clause;
- the updating of the Grievance Prevention and Dispute Settlement clause to reflect the current legislation;
- a Times and Wages Records provision that complies with the provisions of the Act;
- an Introduction of Changes, Termination of Employment in Cases of Redundancy clause; and
- an amendment of the Termination of Service provision in the Award to provide for adequate notice for the termination of casual employees to reflect the Full Bench decision in B1346 of 1999.

Each of these claims was pressed by the QNU.

We refer each of these matters back to Commissioner Bloomfield to see if some of the Respondents' objections can be incorporated into the amendments.

In particular, one objection raised has been the change sought by the QNU in the Award Coverage clause to remove the reference "Boarding Schools" and to replace it with the term "Independent Schools". In our view if a nurse is employed at a non-Queensland Government School then the Award would govern the terms and conditions of such employment. In our view it is appropriate to make this amendment to the Award.

Further substantive amendments are sought in respect of Occupational Superannuation, Accumulation of Sick Leave, Trade Union Training Leave and Workplace Health and Safety Committee. In respect of each of these matters objections have also been raised by some of the Respondents. The QNU has suggested that these matters be referred to a single Commissioner for conference so that any difficulties that the parties may have with the formulation of the provisions can be addressed. We see merit in this course and again refer these matters back to Commissioner Bloomfield in conference.

Finally there are a number of technical amendments outlined in Exhibit 12 such as the removal of the reference to "Nurse Registering Authority for Queensland" and its replacement with "Queensland Nursing Council", the removal of the term "Guaranteed Minimum Wage" and its replacement with the term "Queensland Minimum Wage" etc. We accept the need to make these amendments to the Award.

The operative date for the amendments granted by this Full Bench will be 1 January, 2002.

We direct the QNU to provide Commissioner Bloomfield and the Respondent parties with their proposal for a draft order by 4pm on Friday 23 November, 2001. The draft order should contain all amendments that the QNU seeks to have this Bench make to the Award. If any Respondent proposes alternative amendments to that contained in the QNU's draft order we direct those Respondents to provide Commissioner Bloomfield, the QNU and all other Respondents with their written proposal by 4.00pm on Monday 3 December, 2001. There will be a conference before Commissioner Bloomfield on Wednesday 5 December, 2001 at 10.00am to finalise the terms of the order.

Should there be a need for further determination of matters by this Full Bench then further directions for written submissions will be made at that time.

Order Accordingly.

D.M.LINNANE, Vice President.

A.L.BLOOMFIELD, Commissioner.

D.A. SWAN, Commissioner.

Released: 14 November 2001

Appearances:-

Mr S. Ross, with him Ms G. McCaul and Mr L. Oliver, for the Queensland Nurses' Union of Employees.

Mr M. Smith, with him Ms C. Doyle, for the Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers.

Mr K. Cuddihy, with him Mr B. Cooper, on behalf of the Queensland Catholic Education Employing Authorities.

Mr T. Lovaas for the various Grammar Schools under the Grammar Schools Act.

Mr J. Redsell for the State of Queensland.

Mr R. Egan of Jones Ross Pty Ltd, for the Presbyterian/Methodist School Association.

Mr B. Watts of Employment Advocacy and Mediation Services, for the Queensland Anglican Schools.

Mr J. Patti of Employer Services Pty Ltd, with him Ms S. Webcke, for the Lutheran Church of Australia, Queensland District Schools.

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 125 – application for amendment

**Australian Rail, Tram and Bus Industry Union of Employees, Queensland Branch
AND Queensland Rail (No. B675 of 2001)**

**Queensland Rail AND Australian Rail, Tram and Bus Industry Union of Employees,
Queensland Branch (No. B1199 of 2001)**

QUEENSLAND RAIL AWARD – STATE

PRESIDENT HALL
COMMISSIONERS BECHLY
COMMISSIONER ASBURY

9 August 2001

AMENDMENT

THIS matter coming on for hearing before the Commission at Brisbane on 8 May, 7 June and 25 July 2001, this Commission orders that the said Award be amended as follows as from the ninth day of August, 2001:-

1. By deleting subclause (1)(d) of clause 3.2 (Salaries and Remuneration Structure) and inserting the following in lieu thereof:-

“(d) *Absorption Clause* – The rates of pay in this clause have been adjusted to include pay rates based upon QR EA 4 2000, (CA 168/00). The rates of pay include the arbitrated wage adjustment payable under the 1 September 2000 Declaration of General Ruling and earlier safety net adjustments. The rates of pay in this award are not to be adjusted for State Wage Case increases, granted during 2001 or any further State Wage adjustment increases granted during 2002.”.

2. By deleting subclause (2)(e) of clause 3.2 (Salaries and Remuneration Structure), and inserting the following in lieu thereof:-

“(e) *Pay rates* – Subject to subclause 3.2(1) hereof, the salary rates to be paid to Administrative/Management Stream employees shall be as follows:-

ADMIN/MANAGEMENT STREAM

		Per Fortnight \$
AO8	(4)	2,877.20
	(3)	2,825.30
	(2)	2,772.50
	(1)	2,720.10
AO7	(4)	2,632.50
	(3)	2,573.00
	(2)	2,513.60
	(1)	2,454.40
AO6	(4)	2,346.10
	(3)	2,294.80
	(2)	2,243.90

		Per Fortnight \$
	(1)	2,192.30
AO5	(4)	2,076.20
	(3)	2,020.30
	(2)	1,965.00
	(1)	1,909.40
AO4	(4)	1,811.30
	(3)	1,756.20
	(2)	1,700.90
	(1)	1,645.90
AO3	(4)	1,552.30
	(3)	1,498.40
	(2)	1,444.50
	(1)	1,390.70
AO2	(8)	1,335.00
	(7)	1,291.30
	(6)	1,247.30
	(5)	1,203.60
	(4)	1,159.30
	(3)	1,115.50
	(2)	1,072.30
Age 21	(1)	1,027.50
A01	(3)	858.90
	(2)	784.70
	(1)	710.20

AO Classification Level.”.

3. By deleting subclause (3)(d) of clause 3.2 (Salaries and Remuneration Structure), and inserting the following in lieu thereof:-

“(d) *Pay rates* – Subject to subclause 3.2(1) hereof, the salary rates to be paid to Professional Stream employees shall be as follows:-

PROFESSIONAL STREAM

		Per Fortnight \$
PO6	(4)	2,877.20
	(3)	2,825.30
	(2)	2,772.50
	(1)	2,720.10
PO5	(4)	2,632.50
	(3)	2,573.00
	(2)	2,513.60
	(1)	2,454.40
PO4	(4)	2,346.10
	(3)	2,294.80
	(2)	2,243.90
	(1)	2,192.30
PO3	(3)	2,039.10
	(2)	1,983.20
	(1)	1,927.60
PO2	(6)	1,815.70
	(5)	1,726.50
	(4)	1,625.90
	(3)	1,536.60
	(2)	1,480.60
	(1)	1,424.90
Q-		
PO1	(9)	1,313.50
	(8)	1,257.50
	(7)	1,201.80
	(6)	1,145.90
	(5)	1,089.90
	(4)	1,033.80
	(3)	978.20

	Per Fortnight \$
(2)	922.40
(1)	754.80

PO – Classification Level
Q – Qualification Barrier.”

4. By deleting subclause (4)(d) of clause 3.2 (Salaries and Remuneration Structure), and inserting the following in lieu thereof:–

“(d) *Pay rates* – Subject to subclause 3.2(1) hereof, the salary rates to be paid to Technical Stream employees shall be as follows:–

TECHNICAL STREAM

	Per Fortnight \$
TO6 (4)	2,877.20
(3)	2,825.30
(2)	2,772.50
(1)	2,720.10
TO5 (4)	2,632.50
(3)	2,573.00
(2)	2,513.60
(1)	2,454.40
TO4 (4)	2,346.10
(3)	2,294.80
(2)	2,243.90
(1)	2,192.30
TO3 (3)	2,039.10
(2)	1,983.20
(1)	1,927.60
TO2 (7)	1,815.70
(6)	1,726.50
(5)	1,625.90
(4)	1,536.60
(3)	1,480.60
(2)	1,424.90
(1)	1,313.50
Q–	
TO1 (8)	1,257.50
(7)	1,201.80
(6)	1,145.90
(5)	1,089.90
(4)	1,033.80
(3)	978.20
(2)	922.40
(1)	754.80

TO – Classification Level
Q – Qualification Barrier.”

5. By deleting subclauses (5)(d), (e) and (f) of clause 3.2 (Salaries and Remuneration Structure), and inserting the following in lieu thereof:–

“(d) *Pay rates* – Subject to subclause 3.2(1) hereof, the salary rates to be paid to Engineering Trade Stream employees shall be as follows:–

ENGINEERING TRADE STREAM

	Per Fortnight \$
ET7 (4)	2,632.50
(3)	2,573.00
(2)	2,513.60
(1)	2,454.40
ET6 (4)	2,346.10
(3)	2,294.80
(2)	2,243.90
(1)	2,192.30
ET5 (3)	2,038.30
(2)	1,979.40
(1)	1,920.10

		Per Fortnight \$
ET4	(3).....	1,803.40
	(2).....	1,707.30
	(1).....	1,624.50
ET3	(3).....	1,565.60
	(2).....	1,506.60
	(1).....	1,447.30
ET2	(4).....	1,388.20
	(3).....	1,329.30
	(2).....	1,270.10
	(1).....	1,211.10
ET1	(5).....	1,187.30
	(4).....	1,140.10
	(3).....	1,083.40
	(2).....	1,045.90
Age 21	(1).....	1,018.40

ET – Classification Level

(e) *Pay rates* – Subject to subclause 3.2(1) hereof, the salary rates to be paid to Civil Infrastructure Stream employees shall be as follows:–

CIVIL INFRASTRUCTURE STREAM

		Per Fortnight \$
CI6	(3).....	2,346.10
	(2).....	2,294.80
	(1).....	2,243.90
CI5	(3).....	2,191.90
	(2).....	2,109.30
	(1).....	2,061.90
CI4	(3).....	1,920.10
	(2).....	1,802.80
	(1).....	1,743.00
CI3	(3).....	1,565.60
	(2).....	1,506.60
	(1).....	1,447.30
CI2	(4).....	1,388.20
	(3).....	1,329.30
	(2).....	1,270.10
	(1).....	1,211.10
CI1	(5).....	1,187.30
	(4).....	1,140.10
	(3).....	1,083.40
	(2).....	1,045.90
	(1).....	1,018.40

CI – Classification Level

(f) *Pay rates* – Subject to subclause 3.2(1) hereof, the salary rates to be paid to Operations Stream employees shall be as follows:–

OPERATIONS STREAM

		Per Fortnight \$
OS7	(4).....	2,076.20
	(3).....	2,020.30
	(2).....	1,965.00
	(1).....	1,909.40
OS6	(3).....	1,816.00
	(2).....	1,757.40
	(1).....	1,704.30
OS5	(3).....	1,659.50
	(2).....	1,626.20
	(1).....	1,570.30

		Per Fortnight \$
OS4	(4)	1,503.20
	(3)	1,447.50
	(2)	1,413.90
	(1)	1,380.40
OS3	(3)	1,356.50
	(2)	1,322.80
	(1)	1,289.40
OS2	(4)	1,267.00
	(3)	1,228.10
	(2)	1,204.90
	(1)	1,183.50
OS1	(6)	1,166.40
	(5)	1,133.60
	(4)	1,101.20
	(3)	1,074.00
	(2)	1,042.70
	(1)	1,008.70

OS – Classification Level.”.

6. By deleting clause 3.4 (Work Related Allowances) and inserting the following in lieu thereof:-

“3.4 Allowances

(1) *Principles* – For the purposes of this clause, payment for the allowances outlined below shall be in accordance with the following principles:-

- (a) Unless otherwise stated payment will be made on time worked, not taking into account overtime or penalty rates (i.e. they are not to be paid for all purposes of the Award).
- (b) Unless otherwise stated payment of allowances will be on an hourly basis.
- (c) Unless otherwise stated payment of allowances shall be for actual time to the nearest 30 minutes) for which the allowance is payable.
- (d) Should two allowance entitlements in the one group (i.e. Cleaning, Adverse Conditions, Material, First Aid, Grooming) be applicable at the one time for which different rates are payable, payment will be for the allowance at the higher rate of the two.
- (e) Should two allowance entitlements in the one group (i.e. Cleaning, Adverse Conditions, Material, First Aid, Grooming) be applicable at the one time for which the same rate is payable, then payment would only be made for the one allowance per group at any one time.

(2) *Group 1 – Cleaning* – An allowance of 20 cents per hour shall be paid for the following:-

- (a) *Steam Cleaning* – Labourers required to use a steam cleaner.
- (b) *Soiled Seat Covers* – Employees at Mayne whose duty it is to remove abnormally soiled seat covers from coaches in the Brisbane suburban passenger service, and those employees who assist them, shall be paid this allowance.

(1) *Group 2 (Category A) – Adverse Conditions* – An allowance of 40 cents per hour shall be paid for the following:-

- (a) *Wet Places* – Employees working in wet places shall be paid this allowance in addition to such employee’s ordinary rates.

A place shall be deemed to be “wet when water other than rain is dropping form overhead so that the clothing of the employees so employed there will become saturated with water or where there is water and/or slush underfoot to a depth exceeding 50 mm so that the feet of the employees employed there will become wet. No place shall be considered wet where employees are not actually working or where the wetness is caused by a jet or spraying of water.
- (b) *Examiner Working Stock Wagons* – Examiners required to work under stock wagons that have not been steamed cleaned.
- (c) *Narrow Excavations* – An employee who is employed on Infrastructure work necessitating working in narrow excavations where the depth exceeds 914 mm which require the employee to work in cramped conditions with no circulating ventilation.
- (d) *Grinding in Enclosed Situations* – Any employee operating a pneumatic grinder or engaged in peening or chipping inside water tanks and fuel tanks and scraping down or peening or chipping the inside of engine tenders.
- (e) *Height* – Any employee required to perform work at a height of at least 15.25 metres above the ground or low water level, or nearest horizontal plane.

(2) *Group 2 (Category B) – Adverse Conditions* – An allowance of 60 cents per hour shall be paid for the following:-

- (a) *Painting Box Chords* – Any employee required to paint inside the box chords on the Merivale, Burdekin and Indooroopilly rail on bridges and other similar type bridges.
- (b) *Swing Scaffold* – Any employee who is engaged on work which requires them to be:-
 - (i) on any type of swing scaffold or any scaffold suspended by rope or cable, bosun’s chair etc.

(ii) on a suspended scaffold requiring the use of steel or iron hooks or angle irons at a height of 6 metres or more above the nearest horizontal plane.

(3) **Group 2 (Category C) – Adverse Conditions** – An allowance as outlined below shall be paid for the following:–

(a) *Working in Pollution Wells* – Employees required to work in pollution wells shall be paid an allowance of \$1.0875 per hour (or part thereof) whilst actually working in the well to compensate for the confined space and the wearing of protective clothing and an airline respirator.

Whilst working in this capacity, no employee shall be entitled to the payment of the confined space allowance as provided for in Subclause 5 Group 2 Category C (h) of this Clause.

(b) *Sanitary Servicing* – employees performing sanitary work shall be paid \$1.64 per service. Such work shall be performed during ordinary working hours. Lids shall be provided for sanitary pans.

(c) *Continuous Heavy Work for Blacksmiths* – Blacksmiths operating at fires for continuous heavy work at Ipswich and Townsville Workshops shall be paid 16.70 cents per hour extra and Blacksmith's Strikers at such fires, 10.70 cents per hour extra while so operating.

(d) *Heat Allowance Northern Division* – Blacksmiths and Blacksmith's Strikers, Springmakers and their assistants, Spring bucklers and their assistants in the Northern Division Workshops shall be paid 10.70 cents per hour extra.

(e) *Cash Handling Allowance* – When a motor truck driver is required to undertake cash transactions as part of the delivery and collection of freight, such employee shall be paid an allowance of \$5.60 per week.

(f) *Redlynch and Kuranda Length* – Any employee on Infrastructure work, whilst actually working on any section between Redlynch and Kuranda shall receive 40.00 cents per day extra.

(g) *Outside Windows* – Any employee who is required to clean windows when it is necessary to go wholly outside the windows or climb around an outside column to do such cleaning shall, if such cleaning or climbing is at a height of more than 3 metres from the ground or verandah, be paid 21.30 cents extra for each such window, unless the outside window or column ledge is more than 60 cm wide:

Provided that this allowance shall not be paid if cleaning is done from a ladder resting on the ground.

(h) *Confined Space* – An employee shall be paid 47.10 cents per hour in addition to the ordinary rate for the actual time employed in a compartment, space or place, including underneath wagons/carriages, the dimensions of which necessitate such employee working in a stooped or otherwise cramped position, or without proper ventilation.

(6) **Group 3 (Category A) – Materials** – An allowance of 30 cents per hour shall be paid for the following:–

(a) *Corrosive Substance* – Any employee when using, for the purpose of cleaning or stripping a substance which contains sulphuric acid, hydrofluoric acid or a similar acid to a total of 20% of the volume of the substance.

(b) *Spraying Herbicides* – Employees operating weed spraying equipment shall be paid this allowance when mixing and spraying herbicide.

(c) *Handling Explosives* – Any employee who handles and/or uses explosives.

(d) *Heat Sensitive Compounds* – Any employee in the Workshops area whilst engaged in applying Heat Sensitive Compound procedures.

(e) *Fumigation* – Any employee who is engaged in the operation of an insecticide fumigating machine.

(f) *Shovelling Coal* – Any employee who is required to shovel coal from the ground direct to tender or wagons, or where the intervening space between the coal stack or supply and the tender is 3 metres or more.

(7) **Group 3 (Category B) – Materials** – An allowance as outlined below shall be paid for the following:–

(a) *Fibreglass* – Any employee required to perform work with or upon fibreglass insulation, lay up components or by cutting items made of fibre reinforced plastic in circumstances approved by the employer shall be paid 43.45 cents per hour extra:

Provided that this allowance shall also be paid for the time spent in cleaning up the job and equipment.

(b) *White Metallurgy of Bearings* – Any employee engaged on melting whitmetal shall be paid 64.00 cents per day or part thereof.

(c) *Asbestos Work* – All aspects of asbestos work will meet as a minimum standard with the National Occupation Health and Safety Commission Codes as varied from time to time.

Employees required to use materials containing asbestos shall be provided with and shall use all necessary safeguards as required by the appropriate occupational health authorities.

Where such safeguards include the mandatory wearing of protective equipment (i.e. combination overalls and respiratory protection equipment or similar apparatus) such employees shall be paid 49.05 cents per hour extra whilst so engaged.

(d) *Asbestos (Eradication)* – Any employee engaged in asbestos eradication shall be paid \$1.3235 per hour extra.

The following shall apply to employees engaged in the process of asbestos eradication on the performance of work within the scope of this Award.

Asbestos eradication is defined as work on or about buildings involving the removal or any other method of neutralisation of any materials which consist of or contains asbestos.

Any person performing asbestos eradication work shall do so in accordance with the *Workplace Health and Safety Regulations – 1989*.

Respiratory protective equipment conforming to the relevant parts of the appropriate Australian Standard (i.e. AS 1716 'Specification for Respiratory Protective Devices') shall be worn by all personnel during work involving eradication of asbestos:

Provided that such payment shall be in lieu of all other disability allowances contained in the Award excepting those for Height Allowance as provided for in provision 3.4(3)(e) and Swing Scaffold Allowance as provided for in provision 3.4(4)(b).

(8) *Other Allowances – Disability*

- (a) *Working in the rain* – when employees are required to work in the rain, they shall, unless provided with a raincoat, be paid an additional 100% for such time so worked.
- (b) *Welding Copper Fireboxes* – Employees engaged in copper welding in locomotive copper fireboxes shall be paid a 50% penalty in addition to the ordinary rate for actual time so engaged.
- (c) *Sewage Work* – Plumbers and other employees engaged upon the repairs or maintenance of septic tanks or stoppages in sanitary conveniences shall be paid a 25% penalty in addition to the rate for the day for the actual time so employed, with a minimum payment of one hour.
- (d) *Working in Tunnels* – Employees working in tunnels between Roma Street and Brunswick Street and in the Victoria Tunnel shall be paid a 50% penalty in addition to the rate for the day.
- (e) *Removing Flood Debris* – Employees engaged on removing flood debris from bridges while the flood waters are still over the rails shall be paid a 100% penalty in addition to the ordinary rates for such work:

Provided that removing debris when the water is below the level of the bridge transoms, they shall be paid a 50% penalty in addition to the ordinary rates for such work. Payment shall not be made under provision (3)(a) and (8)(a) hereof in addition to payment under this provision.

- (f) *Carcass Destruction* – employees engage in destroying the carcasses of horses, cattle, sheep, goats, dogs or pigs upon railway premises, or adjacent thereto, shall be paid time and a half of the rate applicable to the day for actual time engaged.
- (g) *Pneumatic Jack Hammer or Drill* – workshop labourers required to use a pneumatic jack hammer or drill shall be paid 18.25 cents per hour in addition to their ordinary rate.
- (h) *Foundry* – Those employees who are employed in foundries shall be paid 20.5 cents for each hour worked.

For the purpose of payment of this allowance, foundry work shall be that performed by employees engaged on –

- (i) any operation in the production of castings by casting metal in moulds made of sand, loam, metal, moulding composition or other material or mixture of materials, or by shell moulding, centrifugal casting or continuous casting and;
- (ii) where carried on as an incidental process in connection with and in the course of production to which provision (i) of this definition applies, the preparation of moulds and cores (but not in the making of patterns and dies in a separate room), knock out processes and dressing operations, but shall not include any operation performed in connection with:–
 - (A) non-ferrous die casting (including gravity and pressure);
 - (B) casting of billets and/or ingots in metals moulds;
 - (C) continuous casting of metals into billets;
 - (D) melting of metals for use in printing;
 - (E) refining of metal.

The foundry allowance shall be in lieu of any award entitlement in respect of dirty work, hot work, or work in confined spaces, and does not in any way limit the employer's obligation to comply with all relevant requirements of Acts and regulations pertaining to working conditions in Queensland foundries.

- (i) *Livestock Vans* – Employees cleaning pig, sheep, cattle and horse vans shall be paid 25.75 cents per hour extra.
 - (j) *Sand Blasting Bridges* – An employee sand blasting bridges shall be paid 21.10 cents extra for each hour or part thereof for the actual time engaged in working the sand blast machine.
 - (k) *Livestock Wagon Preparation* – Any employee engaged on the stripping down of livestock wagons, the handling and removing of old preparation timber and the cleaning out of the compacted manure prior to the actual commencement of repair or replacement work, shall be paid 48.05 cents per hour extra.
 - (l) *Air Support Respiratory Mask* – Any employee required to wear protective clothing and an air support/respirator/mask shall be paid 63.55 cents per hour extra.
 - (m) *Handling Cement* – Any employee who is engaged in the physical handling of cement, cement bags, tar, lime, soda ash, acid jars or fireclay, shall be paid 31.85 cents per hour extra.
 - (n) *Wet Tar* – Any employee who performs work on a boiler coated with wet tar shall be paid 33.35 cents per hour extra.
 - (o) *Handling Green Hides* – Employees handling green hides in a decomposed condition shall be paid 31.85 cents per hour extra whilst so employed.
 - (p) *Fumigation* – Any employee who is engaged in the fumigation of buildings and use of poisons shall be paid 33.35 cents per hour extra.
- (9) *DOO Shunt Operations* – Yard Forepersons and Shunting Grade employees shall be paid 5% of their ordinary rate of pay, in addition to their ordinary rate of pay, when working with shunting locomotives operating in Driver Only Operation (DOO) mode.

This allowance shall be paid for overtime and penalty rates when DOO mode is operating with a minimum payment of 4 hours.”.

7. By deleting subclause (2)(b) of clause 3.5 (Travelling and Meal Allowances) and inserting the following in lieu thereof:-

“(b) *Migratory Gang Camp Allowance* – The payment of living away from home allowance for employees required to utilise an established migratory gang camp shall be as follows:-

- (i) For distances where the camp site is equal or less than a radius of 20 km from the home station, no allowance payable.
- (ii) For distances where the camp site is greater than a radius of 20 km from the home station, the allowance shall be \$18.60 per night.
- (iii) The allowance as set out in 3.5(2)(b)(ii) will be payable for each day the employee presents themselves ready, willing and able to start work at the relevant site and by the pre-arranged starting time as organised by the employer:

Provided that the employee will be eligible for the allowance if off duty sick and staying in camp:

Provided further that where an employee is required to stay in camp during weekends for security as authorised by their supervisor, they shall receive the allowance to cover such days.”.

8. By deleting subclause (2) of clause 3.8 (Tool Allowance) and inserting the following in lieu thereof:-

“(2) The amounts of the tool allowances for each level shall be as follows:-

Level	Per week
	\$
A.....	18.90
B.....	13.50
C.....	10.80
D.....	8.10
E.....	5.40
F.....	4.60”.

9. By inserting a new clause 3.9 (Leading Hands) as follows:-

“3.9 Leading Hands

- (1) A leading hand, in the case of a tradesperson, shall be paid over and above the rate prescribed herein for the class of tradesperson or paid over and above the rate of the leading hand’s charge as follows:-
 - (a) When in charge of fifteen or less employees, 44.30 cents per hour.
 - (b) When in charge of more than fifteen employees, 87.50 cents per hour.
 - (c) A leading hand other than a tradesperson shall be paid 25.75 cents per hour over and above the rate prescribed for the highest paid employee under the leading hand’s charge.
- (2) When leading hands are required they shall be selected from employees who are eligible for promotion by efficiency and merit.
- (3) Leading hands shall be appointed on probation for a period of three months. Any leading hand who, at the expiration of that period, has proved unsatisfactory as a leading hand shall revert to the employee’s former position.”.

10. By inserting a new clause 3.10 (Ambulance Attendants) as follows:-

“3.10 Ambulance Attendants

Employees appointed to perform the duties of ambulance attendants shall be paid \$1.50 per day in addition to their ordinary rates:

Provided that such allowance shall not be paid when employees are on leave, and when such employees are away on leave, substitutes shall be appointed to act in their place.”.

11. By deleting subclause (6) of clause 4.2 (Overtime) and inserting the following in lieu thereof:-

“(6) *Alteration of Shift at Short Notice* – (a) *Deferred Sign on Time* – When an employee is advised at the employees residence not less than two (2) hours before commencement of a rostered working shift, that such starting time has been altered to a later hour, such employee shall be allowed one (1) hour’s pay. If such advice is provided in less than two (2) hours, the employee shall be allowed two (2) hour’s pay.

Such pay shall be calculated at the rate applicable to the particular day and shall not be taken into account for the purpose of calculation of overtime:

Provided that those employees covered by a spread of hours provision shall be paid the appropriate overtime penalty rates for any altered hours outside of the 0600 to 1800 hours spread.

(b) *Shift Brought Forward* –

- (i) The employer shall provide employees with at least twenty-four hour’s notice or before the cessation of the previous shift, of an alteration to the employees next day’s rostered working, bringing the starting time forward to an earlier hour, without attracting overtime penalties:

Provided that those employees covered by a spread of hours provision shall be paid the appropriate overtime penalty rates for any altered hours outside of the 0600 to 1800 hours spread.

(ii) Where notice has been given after the cessation of the previous shift and the notice is within 24 hours of the intended new shift, the following method of payment shall apply:-

(A) all time worked outside of the previous rostered hours shall attract overtime penalty in accordance with this clause.

(B) employees shall be entitled to passive payment at ordinary rates for all previously rostered hours not worked in the changed shift.

(C) all time worked within the hours of the previously rostered shift shall be treated as ordinary time to be paid at the rate applicable to the day.

(c) The 24 hour notice time period shall be calculated from the time of the notification to the time of the altered start time.”.

12. By deleting (A), (B) and (C) from subclause (2)(a)(i) of clause 4.6 (Shift Allowance and Shift Loading) and inserting the following in lieu thereof:-

- “(A) \$1.58 per hour for an afternoon shift
- (B) \$1.82 per hour for a night shift
- (C) \$1.58 per hour for an early morning shift.”.

13. By deleting the amount of ‘\$3.37’ in subclause (4)(a) of clause 4.6 (Shift Allowance and Shift Loading) and inserting an amount of ‘\$3.55’ in lieu thereof.

14. By deleting subclauses (A), (B) and (C) from subclause (10)(a)(i) of clause S1.1 (Hours of Work, Overtime, Meal Breaks etc.) at Schedule One – Traincrew other than Operations Assistants, and inserting the following in lieu thereof:-

- “(A) \$1.58 per hour for an afternoon shift
- (B) \$1.82 per hour for a night shift
- (C) \$1.58 per hour for an early morning shift.”.

15. By deleting the amount of ‘\$3.37’ in subclause (10)(b) “Shift Loading” of clause S1.1 (Hours of Work, Overtime, Meal Breaks etc.) at Schedule 1 – Traincrew other than Operations Assistants, and inserting an amount of ‘\$3.55’ in lieu thereof.

16. By deleting the amount of ‘\$1.78’ at subclause (6) “Shift Allowance” of clause S2.1 (Passenger Attendants, Passenger Services Supervisors) at Schedule 2 – Catering and On Board Services Staff, and inserting an amount of ‘\$1.88’ in lieu thereof.

Dated this ninth day of August, 2001.

By the Commission,
[L.S.] E. EWALD,
Industrial Registrar.

Operative Date: 9 August 2001
Amendment – Salaries and Allowances
Released: 13 November 2001

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 74 – application for reinstatement

Sherri Rutherford AND Department of Premier and Cabinet (No. B559 of 2001)

COMMISSIONER ASBURY

8 November 2001

Unfair dismissal claim – Dismissal prior to return from maternity leave – Section 32 *Industrial Relations Act 1999* – Return to work after parental leave – No breach of s. 32 as applicant did not return to work – Dismissal due to operational requirements – Notification to employee of reason for dismissal – Discussions with applicant would not have altered outcome – Termination payments exceeding statutory minimum – Opportunity to mitigate dismissal one of value – Termination payments cover reasonable period when opportunity to mitigate dismissal could have been given to applicant – Contract provided that there was no tenure – Applicant worked on a number of separate engagements under similar contracts – Applicant can have had no expectations about job security – Dismissal not unfair – Application dismissed.

DECISION

Background

This is an application by Ms Sherri Rutherford (the applicant) alleging her unfair dismissal by the Department of Premier and Cabinet (the respondent). The application further contended that the dismissal of the applicant was for an invalid reason in that it was contrary to s. 73(2)(e) of the *Industrial Relations Act 1999* (the Act). Following the evidence called during the hearing this contention was not pressed.

The applicant commenced employment as an Administrative Officer with the Department of Premier and Cabinet on 19 August 1998. The applicant was initially employed in the office of the then Parliamentary Secretary to the Deputy Premier. Following a complaint of sexual harassment against a fellow employee the applicant was moved to the Premier’s office on 14 June 1999, pending investigation of that complaint.

From 12 July 1999 the applicant was absent from work on special leave with pay. On 19 August 1999, the applicant took her complaint of sexual harassment to the Anti-Discrimination Commission (Queensland). With effect from 16 December 1999, the office of the Parliamentary Secretary to the Deputy Premier was abolished and staff were dismissed or transferred to other Ministerial offices.

On 16 January 2000 the applicant ceased special leave with pay and took paid sick leave up to 27 January 2000. From 28 January to 2 March 2000 the applicant was absent from work on recreation leave. At 3 March 2000 the applicant was over 31 weeks pregnant, and took paid maternity leave from that date until 13 April 2000. The applicant then commenced unpaid maternity leave, and following the birth of her baby on 29 April 2000, was absent until 2 March 2001.

On Friday 2 March 2001 the applicant was advised that her employment had been terminated, and that a letter to that effect had been couriered to her home. The reason for the termination as set out in that letter was the abolition of the office of the Parliamentary Secretary to the Deputy Premier in December 1999, and that the applicant's position was surplus to requirements (Attachment SR2 to Exhibit A1).

The terms and conditions of the applicant's employment were governed by a written contract of employment, signed by her on 9 November 1998. The contract states in a number of clauses that it is without real or implied tenure and may be readily terminated (Clauses C and 4 of Attachment SR1 to Exhibit A1).

Clause 11 of the contract sets out termination benefits which are in excess of the minimum notice provisions set out in s. 84 of the Act. Those benefits also exceed entitlements under the Commission's Declaration of Policy on *Termination, Change and Redundancy*. Payment of accrued long service leave on termination of employment is also provided for appointees with at least one year of continuous service. Subclause (c), clause 11 provides that where employment is terminated the payments on termination provided for by the contract constitute the whole of the entitlement.

Schedule 6 read in conjunction with Part A of the contract provides that the applicant was engaged in the office of the Deputy Premier and Minister for State Development and Minister for Trade or the Minister to whom she was assigned from time to time.

The Applicant's Evidence

Evidence for the applicant was called from the applicant herself. Much of the applicant's evidence about the dates of various events, was uncontested. The exception was the applicant's contention that she had been formally transferred to the Premier's office on 16 December 1999. Under cross-examination the applicant said that the formal transfer had been communicated to her former solicitors and not to her directly. The applicant said in her evidence (prior to instructing Counsel that she was no longer seeking reinstatement) that it might not be in everybody's best interests if she returned to the Premier's office and that it may be "uncomfortable" for herself and a number of other people.

The applicant had telephoned Mr Ian Street of the Ministerial Services Branch on the morning of 5 February 2001, to confirm her intention to resume her position in the Premier's office at the end of her maternity leave. The applicant said that during this conversation, she had suggested to Mr Street that it might be more comfortable for all concerned if she worked somewhere other than the Premier's Department. The applicant said that she had suggested the office of another Minister, and had also made this suggestion to Ms Julie Eilers of the Ministerial Services Branch, in a telephone conversation in late January 2001.

On the afternoon of 5 February 2001, the applicant said that Mr Street telephoned her to advise that he had spoken to Mr Whiddon about her desire to work in another Minister's office and that inquiries would be made along those lines. The applicant said that Mr Street also told her that she was to report to Mr Whiddon on her first day back at work, at 9.00 am on Monday, 5 March 2001. Between 26 February and 2 March 2001, the applicant said that she telephoned the Ministerial Services Branch each day in an attempt to ascertain her hours of work and where she would be working, and was not provided with any information in response to these queries. On Friday 2 March, the applicant said that Ms Larkin told her, in response to an earlier query, that she could work Monday, Tuesday and Wednesday of the following week to enable her to be paid on Wednesday 7 March 2001. The applicant also said that Ms Larkin told her that Mr Street would telephone her later on 2 March about other issues.

At 5.15 pm on 2 March 2001, the applicant said that she received a call on her mobile telephone from Mr Street, to inform her employment had been terminated and that a letter to this effect had been couriered to her home. The applicant said that since her dismissal she had been unable to find employment in Brisbane, and in July 2001 had moved to Victoria where she had also been unsuccessful in obtaining employment.

Submissions for the Applicant

Mr Reed for the applicant submitted that the applicant's dismissal was unfair, on a number of grounds. The dismissal was unfair because no warning was given to the applicant about the dismissal. Mr Reed submitted that the conduct of the respondent, in advising the applicant at 5.15 pm on the Friday before she was due to resume work, that her contract was terminated, should cause the Commission some concern. It was further submitted that the action of the respondent was contrary to assurances the applicant was given about her return to work. The conduct of the respondent in failing to discuss the reasons for the dismissal with the applicant was also said to have made the dismissal unfair.

Further, the dismissal was said to be unfair, because the purported reason for the dismissal i.e. that the applicant's position was "surplus to requirements" was not true. It was argued that the letter of termination, which stated that the applicant's employment was with the Department of the Deputy Premier, was incorrect. Mr Reed submitted that from 16 December 1999, the applicant's substantive position was with the Premier's office and not the Department of the Deputy Premier.

Mr Reed submitted that there was no evidence of a reduction in overall staffing numbers in the Premier's office, and that the number of staff in that office had in fact increased. It was argued that as a matter of fairness, consideration should have been given to whether there was a position for the applicant available in the Premier's office, and then whether a position was available in the office of any other Minister. If the applicant's position was surplus to requirements, it became so on 16 December 1999, when the office of the Parliamentary Secretary to the Deputy Premier was abolished.

It was further submitted that the evidence of Mr Robert Whidden for the respondent, clearly demonstrated that in deciding that there was no position available for the applicant, he acted on an incorrect assumption, that the applicant did not wish to return to the Premier's office. In addition, Mr Whidden's evidence showed that he had failed to forward the applicant's curriculum vitae to the office of any other Minister, and had not attempted to find the applicant an alternative position.

Mr Reed contended for the applicant that the failure of the respondent to make a position available to her upon her return from maternity leave, contravened s. 32 of the Act, and was a further ground which lead to the dismissal being unfair. In this regard it was submitted that s. 32(2) entitled the applicant to return to the position she had held immediately before starting maternity leave. Further, s. 32(3) entitled the applicant to be employed in a position that was as nearly possible comparable in status and remuneration to her former position, if that former position no longer existed. Finally, it was argued that s. 32(4) required the employer to make a position to which the applicant was entitled, available to her.

Mr Reed referred to the decision of Bacon C of the Australian Industrial Relations Commission in *Waghorn v South Blackwater Coal Limited* Print S067, as authority for the proposition that where an employer engages in conduct prohibited by the *Workplace Relations Act 1996* (Cth), that conduct can be called in aid to determine whether the termination of an employee was harsh, unjust or unreasonable.

During the course of the hearing, Mr Reed advised that the applicant was no longer seeking reinstatement. In seeking the maximum compensation provided under s. 79 of the Act, Mr Reed submitted that but for the dismissal, the applicant ought to have been guaranteed work for at least the current term of the Government.

The Evidence for the Respondent

Evidence for the respondent was called from the following persons:—

Mr Ian James STREET, Principal Human Resources Consultant, Ministerial Services, Department of Premier and Cabinet;
Mr Robert Frank WHIDDON, Chief of Staff, Office of the Premier;
Ms Kym LARKIN, Human Resource Management Consultant, Ministerial Services, Department of Premier and Cabinet; and
Ms Julie Ann EILERS, Human Resource Management Consultant, Ministerial Services, Department of Premier and Cabinet.

All of the witnesses for the respondent rejected the proposition that the applicant had been formally transferred to the office of the Premier from 16 December 1999. Mr Street said that the applicant had been temporarily placed in the office of the Premier during the investigation of her sexual harassment claim. The applicant had not been appointed to a permanent role, or transferred pursuant to the provisions of her contract. A formal allocation of the applicant to the Premier's office would have required paperwork signed by the Premier. No such paperwork existed with respect to the applicant.

Mr Whiddon agreed under cross-examination that the applicant's salary had been costed to the Premier's office, after the abolition of the office of the Parliamentary Secretary to the Deputy Premier.

Evidence about the nature of the appointment of Ministerial staff, and the events which lead to a situation where the applicant's employment was seen by the respondent to be surplus to requirements, was given by Mr Whiddon. His evidence was that in all cases of the employment of Ministerial staff, selection is made by the individual Minister, whose choice is then subject to the final approval of the Premier. Generally, Ministerial staff are not subject to formal selection processes as are public servants. Ministers may request details of existing staff requiring placements, or make their own recommendations as to the staff member they wish to employ.

Mr Whiddon said that following the State election in February 2001, Ministers who were retaining their previous roles, for the most part advised that they wished to continue with their previous Ministerial staff appointments. Those allocated new responsibilities took a similar attitude, but in some cases wished to add staff with specific expertise. It had been Mr Whiddon's responsibility to find positions for Ministerial staff not required by Ministers, or who had been employed by retiring Ministers. An additional Ministerial position which had been established, also required a full complement of staff.

Over 200 applications were received from people expressing an interest in working in Ministerial offices, although few were placed because of the limited number of vacancies. Further, some Ministers had made staff choices to meet their requirements from outside the current staffing arrangements. Mr Whiddon said that at the conclusion of the process of filling Ministerial staff positions, there were a number of people for whom positions were not available. In those cases, staff including the applicant, were terminated in accordance with normal arrangements under their contracts.

Mr Whiddon also said that he recalled being told after the last State election by the Ministerial Services Branch that the applicant had expressed an interest in working in the office of another Minister, and earlier discussions where the applicant had said that she did not want to work in George Street or the Executive Building. After the election, that Minister had filled all positions with existing staff.

Mr Whiddon said that he had considered all available Ministerial staff positions, and determined that there were no suitable positions available for Ms Rutherford. Mr Whiddon also said that the number of staff in the Premier's office had increased, but that additions had been at levels other than that at which the applicant had been employed and that there was no position available for the applicant in that office.

Mr Street in his evidence outlined the staffing changes in Ministerial offices following the February 2001 election. Four staff at AO2 and AO3 levels including the applicant, had their employment terminated in the period from 22 February to 3 April 2001, and there are currently three less Administrative Officers than there were prior to the Ministerial reshuffle following the February 2001 election. An additional seven staff had been employed at those levels during the same period (Exhibit A3). Mr Whiddon said in his evidence that most of the seven staff who had been employed in that period, had previously worked on either a relieving or temporary basis, and had been specifically requested by individual Ministers whom they had worked for.

Mr Street agreed under cross-examination that he had contacted the applicant on her mobile telephone at 5.15 pm on 2 March 2001, to advise her that her employment had been terminated, and that a letter to that effect was being couriered to her. Mr Street said that he knew that the applicant was planning to return to work in the Premier's office on 5 March 2001. Mr Street had been told of the decision to terminate the applicant's employment on 2 March 2001 by Mr Whiddon, and had caused the letter advising the applicant of this, and other documentation to be prepared.

Mr Whiddon said that the fact that the applicant had been on maternity leave had no bearing on the decision to terminate her employment. Mr Whiddon further said that had a position been available for the applicant, that there would have been no impediment to her returning to work, or to her working on a part-time basis, should she have desired to do so.

Submissions for the Respondent

Mr Murdoch for the respondent, submitted that there had been no breach by the respondent of the provisions of s. 32 of the Act, because s. 32 is confined to situations where an employee actually returns to work after parental leave. As the applicant's employment was terminated before she returned to work, s. 32 was never enlivened. The use of the phrases "returns to work" in s. 32 and "returning to work" in s. 28(1) of the Act, can be contrasted with the phrase "wants to return to work" in s. 30. Mr Murdoch argued that the purpose of s. 32 is to protect an employee's status in the workplace, when the employee actually returns to work.

Mr Murdoch also argued that s. 34(1) prohibits dismissal of an employee because the employee or the employee's spouse has given birth to or adopted a child; the employee's spouse has given birth to or adopted a child; or the employee has applied for or is absent on parental leave. That section does not prohibit the dismissal of an employee while the employee is absent on parental leave. Further, s. 34(2) specifically states that the section does not affect any other rights of the employer to dismiss an employee, or the rights of a dismissed employee.

Mr Murdoch concluded his submissions on this point by arguing that an employer, who without a valid reason, dismisses an employee to avoid the obligations of s. 32 could be confronted with an unfair dismissal application. However, this would not mean that the employer had breached s. 32, if there had been no return to work.

In relation to other aspects of the applicant's case, Mr Murdoch said that it was clear that the contract between the applicant and the respondent had expressly confined and limited tenure. Compensating for the lack of tenure was a liberalised arrangement whereby persons who may not have been qualified on merit to be admitted to the public service, could be employed on public service terms and conditions, as Ministerial staff members. In addition, the enhanced termination benefits provided by the contract were paid in recognition of the lack of express or implied tenure.

Mr Murdoch also argued that it was erroneous to suggest that a right to procedural fairness arose out of the contract. A claim for additional compensation for the manner of the termination, is expressly precluded by clause 11 of the contract. As compensation for the lack of notice of the termination, the applicant had received payment in lieu as provided by the contract, and such payment was in excess of standard award and legislative provisions.

The respondent could not be held to have acted unfairly, simply because a right to terminate the applicant's employment in a manner provided for by her contract had been exercised. There was no requirement for the applicant to be given warning of the dismissal, because it did not arise out of an issue of conduct or performance. Further, the applicant had not made good the allegation that her position was not in reality surplus to requirements, and that the reason for her dismissal was other than the one given by the respondent. The evidence of the respondent's witnesses on this point was essentially unchallenged.

Mr Murdoch submitted that the applicant had not established that she had been formally appointed to the Premier's office. The applicant had been placed in the Premier's office to ensure that she would not be required to work with a person against whom she had made an allegation of sexual harassment. In fact, the applicant had worked in the Premier's office for only a short period before taking an extended period of leave, from which she had not returned when she was dismissed. The decision to dismiss the applicant had been taken as a result of changes to staffing requirements resulting from the February 2001 election, and the abolition of the office of the Parliamentary Secretary to the Deputy Premier, and for no other reason.

Conclusion

The question for determination in this case is whether the dismissal of the applicant was unfair, on the basis that it was harsh, unjust or unreasonable. In deciding whether a dismissal is unfair, the Commission must consider the matters set out in s. 77 of the Act. Section 77(1) of the Act requires the Commission to consider whether the employee was advised of the reason for the dismissal.

Advice to the employee of the reason for the dismissal, is an important factor in determining whether the dismissal was fair. The opportunity for an employee facing dismissal to mitigate their situation, is one of value, and will be afforded weight by the Commission. However, there are cases where the Commission has found that the opportunity to mitigate would not have avoided the dismissal of the employee. In such cases a nominal amount of compensation has been awarded to cover a period when the employee could have been given such an opportunity and compensate the employee for earnings lost during the period where consultation could reasonably have occurred.

Central to the applicant's argument of unfairness, is the fact that she was telephoned at the last minute, after holding a number of discussions with the Ministerial Services Branch about her return to work, and dismissed without being given any notice that this would occur. The effect of this was that the applicant was denied an opportunity to put her views about her dismissal to Mr Whiddon, and to mitigate her dismissal before it occurred.

It was not argued for the applicant that she had been made redundant or that she had an entitlement to be consulted about her dismissal as prescribed by redundancy provisions either under the Act or an Award. This was a case about whether failure to notify or consult the applicant about her dismissal made that dismissal unfair.

The applicant in this case was not notified of her dismissal until very late in the piece. However, I am unable to be reasonably satisfied that in all of the circumstances, the dismissal was unfair because of the lateness of the notification.

In *Hunter v Heat and Control Pty Ltd* then Chief Commissioner Hall noted the distinction between a case about the construction of an instrument dealing with redundancy, and a case about whether there was a valid reason for a dismissal, as was required by the previous legislation. In that case, the Chief Commissioner said:-

"I am not prepared to find that consultation would have made any difference. Neither can I see any unfairness in the absence of consultation. I can understand that where a substantial number of employees are to be terminated, and there is something of an issue about who should be retained and who should not, fairness may require consultation with all. However, this was a case about one employee. A clear decision had been made."

In this case, I am of the view that had the applicant been notified of her dismissal and the reasons for it at an earlier time, the outcome would have been no different. Further, the applicant received payment in lieu of notice and other amounts exceeding standard entitlements on termination or redundancy. Those payments to the applicant cover a period which is in excess of any time frame over which consultation could reasonably have occurred.

I do not accept that the applicant was formally transferred to the Premier's office in accordance with standard procedures followed by the Ministerial Services Branch. It is very clear from the evidence that the applicant was moved to the Premier's office for the specific reason of her sexual harassment complaint. The action of removing the applicant from an environment where she would have been required to work with the person against whom she had made her complaint was entirely reasonable. The fact that when the office of the Parliamentary Secretary to the Deputy Premier was abolished, the applicant's salary was costed to the Premier's office is an accounting issue, and does not in my view, constitute a formal transfer, regardless of how it was termed by staff in the Ministerial Services Branch.

With regard to s. 77(b), I am satisfied that the dismissal of the applicant was based on the operational requirements of the respondent. The evidence shows clearly that there were changes to Ministerial responsibilities following the February 2001 election and a corresponding reduction overall in the number of Ministerial staff. The evidence for the respondent, about what triggered the dismissal of the applicant is probable, and I accept the submissions of Mr Murdoch in this regard. While the applicant was on an extended period of leave, there was no reason to take any action with respect to her continued employment, as a result of the abolition of the office of the Parliamentary Secretary to the Deputy Premier, or the February 2001 election. The intention of the applicant to return to work brought into focus the fact that the office the applicant had originally worked in had gone, and that her position had become surplus to requirements.

It is also clear from the applicant's own evidence that she did not feel comfortable about returning to the Premier's office and had expressed a view that she wanted to work in the office of another Minister. I accept that for operational reasons this request was not able to be accommodated. I also accept that there was no position available for the applicant in the Premier's office.

It does not assist the applicant at all to argue that if her position was genuinely surplus to requirements, she would have been dismissed on 16 December 1999, when the office of the Parliamentary Secretary to the Deputy Premier was abolished. The applicant was afforded the benefit of paid leave which was not provided for in her contract, while her complaint of sexual harassment was being investigated and subsequently litigated. The fact that she was not dismissed while on leave, when the office to which she was assigned was abolished, cannot in my view constitute grounds for finding that she was unfairly dismissed when she sought to return from that leave.

I accept Mr Whiddon's evidence that he took reasonable steps to attempt to find positions for staff who had not been personally selected by Ministers. In my view it is also relevant that the applicant was employed under a contract which recognised that there was no implied or express tenure associated with

her employment. The applicant accepted this, and the evidence shows that she had worked under these arrangements for a considerable period of time and during a number of separate engagements.

While a contract of employment cannot override the specific provisions of the Act, it can establish the expectations and understandings of the parties to it. The expectations of job security held by dismissed employees when they took up employment with a particular employer, have often formed the basis for a finding that a dismissal was unfair. Given the specific provisions of the applicant's contract, and her past experience working in similar roles, the applicant can have been under no illusions about the lack of tenure associated with her employment. Further, it is clear that in return for the lack of express or implied tenure, the contract provided enhanced benefits, which were enjoyed by the applicant.

The provisions of s. 77(c) are not applicable in this case as the dismissal did not relate to conduct, capacity or work performance.

A breach of the provisions of s. 32 of the Act by an employer, would be a matter that the Commission could consider under s. 77(d), as a basis for a finding that a dismissal was unfair. I have however, reached the view that the argument advanced by Mr Murdoch with respect to the operation of s. 32 is correct and that the section has not been breached in the circumstances of this case.

On a literal reading, s. 32 applies to "an employee who returns to work after parental leave" as provided in subsection (1)(a). The wording of s. 32(1)(a) is essentially the same as that of the previous legislation. Equivalent provisions in the *Workplace Relations Act 1997* (s. 171) and the *Industrial Relations Act 1990* (s. 269) applied "when an employee returns to work after ... maternity leave."

Section 32(1)(a) of the Act is expressed in the present tense. It was held by the High Court in *Re: Dingjan; Ex parte Wagner* (1994-1995) 183 CLR 323 at 362 that the power conferred on the Australian Industrial Relations Commission to set aside or vary an unfair contract, can be exercised in relation to a contract that has been discharged. Gaudron J in that decision considered the use of present tense in statutes, and distinguished between the "simple present" where tense is descriptive, and the "continuous or progressive present" where contemporaneity is indicated.

In my view, the use of the present tense in the phrase "an employee who returns to work after parental leave" in s. 32(1)(a) is not merely descriptive. Rather the phrase is in the continuous or progressive present tense and stipulates the event which triggers the entitlements under s. 32. That event is the return to work of the employee.

When s. 32(1)(a) is read in the context of Division 1 of Part 2 of the Act, it is clear that there is a distinction between an employee who wants to do certain things – e.g. take parental leave – and who actually does them: (see ss. 20 and 21).

Further, where rights and obligations in that Division are enlivened by an intention, there are requirements to notify the other party affected in advance or for the parties to reach agreement about timing (see ss. 19 and 28). There are no such requirements under s. 32, which indicates that the trigger point for those entitlements is a return to work, rather than an intention to do so.

The interpretation of s. 32 of the Act advocated by Mr Murdoch, which I have accepted, does not deprive an employee dismissed because he or she has expressed an intention to return to work from parental leave, of a remedy. A dismissal of an employee for this reason would be arguably unfair and for an invalid reason.

However, in this case the dismissal of the applicant was not because she had expressed an intention to return from maternity leave. Rather the applicant was dismissed because upon her intention to return from maternity leave being communicated to the respondent, it was discovered that her position was surplus to requirements.

Overall, I am unable to be reasonably satisfied that the dismissal of the applicant was unfair. In reaching this decision, I have considered all of the circumstances of the case including the nature of the applicant's contract of employment; the level of termination payments which the applicant received; the events which lead to her dismissal; and the fact that it was because of the operational requirements of the respondent.

The application is dismissed. I order accordingly.

I.C. ASBURY, Commissioner.

Appearances:-

Mr R. Reed, Counsel, instructed by Denise Maxwell, Solicitor, for the applicant.

Mr J.E. Murdoch, SC, with Mr M. O'Sullivan, instructed by Mr M. Smith of Crown Law, for the respondent.

Released: 8 November 2001

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 74 – application for reinstatement

Laurie Healy AND Darling Downs Bacon Co-Operative Association Limited (No. B547 of 2001)

COMMISSIONER EDWARDS

12 November 2001

Reinstatement – Dismissal – Termination of Employment – Redundancy – Certified Agreement – Evidence – Financial Position of Company – Skills Matrix – Assessment of Employees – Operational Requirements – Application Refused.

DECISION

By application filed on 22 March 2001 Mr C. Price, Assistant State Secretary of the Federated Engine Drivers' and Firemen's Association of Australasia Queensland Branch, Union of Employees applied for reinstatement of Mr L. Healy to his former position with Darling Downs Bacon Co-Operative Association Limited (the Company).

The hearing was held in Toowoomba on 6 September 2001. The following witnesses were called:-

Robert John Haworth;
Graham Daniel Hartwig;
Laurie Healy;
Evelyn Nancy Robins;
Peter John Murray Bennett; and
Roy William Emmerson

Mr Healy was employed by the respondent for approximately 15 months and was made redundant on 2 March 2001.

During the latter part of 2000 the Company and the unions negotiated an agreement which was voted on by the employees and subsequently certified by the Commission on 23 February 2001 (CA61 of 2001). The question of redundancies or retrenchments as a result of financial circumstances was not an agenda item during discussions for the Certified Agreement. As such clauses 7.5 and 10.9 state:–

“7.5 The parties agree that Enterprise Bargaining shall not result in redundancies nor disadvantage the employment of any staff member”.

10.9 At all times the parties undertake to participate in consultations in good faith.”.

The Commission accepts that on this occasion the redundancies were not the result of the Certified Agreement but other factors as outlined in evidence by Ms Robins. Even so the Commission would assume that the parties intended that consultation in good faith would relate to all industrial matters.

Ms Robins advised in evidence:–

- at its December 2000 meeting the Board considered the financial situation and the question of redundancies was raised;
- in February 2001 agreed remedial action needed to be taken and redundancies would occur;
- that the Engineering Department was considered to be “overmanned” and would suffer redundancies;
- the Chief Executive Officer was given instructions to proceed with redundancies without delay; and
- the method of using a skills matrix was discussed.

In relation to management of the human resource aspects of the decision, the Board discussed the proposal to use a skills matrix. She understood Mr Bennett and Mr Emmerson worked closely with the former Manager, Human Resources to develop a matrix to assess each and every employee of the Engineering Department. Employees or their representatives were not invited to participate in the discussion.

In an attempt to manage the decision of the Board it was decided that a matrix would be used as the appropriate tool to assess relevant employees. Mr Emmerson, Engineering Service Manager was given the responsibility. He was not trained or given any advice on the use of the matrix and in evidence stated, “but you weren’t given any real instructions on how to use it? No, it was just a tool that I could use to help me make the selection criteria.”.

The Commission agrees with the submissions of Mr Price:–

“Regarding the skills matrix that was used, I think it’s fair to say that Mr Emmerson showed a clear non-understanding of how the matrix should be operated. He said he was given the document with no instructions as a guide. I don’t know what other opportunities Mr Emmerson had before him, but certainly, it would appear that the then HR manager got a copy of the skills matrix but gave him no instructions on how it should be applied – what should be looked at – and Mr Emmerson was left on his own. I think that’s an unfortunate position that Mr Emmerson was put in, but nonetheless, it certainly appears from cross-examination that he had no instructions on how to utilise the skills matrix. He just did the best he could with the knowledge he had.”.

As a result of the decision of the Board determinations were made without consultation and without the affected employees being familiarised with the operation of the matrix. The employees were not given any acceptable opportunity to respond to the decision of the Board.

On consideration of the evidence of Ms Robins and a review of the Certified Agreement negotiations there is no doubt that the Board of Directors were operating with two agendas from December onwards. In this regard the unions and employees were negotiating with authorised Company executives on an industrial agenda which was different to the agenda under consideration by the Board. It is intriguing that the Board representatives were negotiating an industrial instrument including a clause “consultation in good faith” at the same time as the Board was giving thought to redundancies. From an industrial relations viewpoint it is disappointing that the unions were not advised in an appropriate way of the true financial position of the Company. The Principal object of the *Industrial Relations Act 1999* is outlined in clause 3, which provides for a framework for industrial relations that supports economic prosperity and social justice. The Commission refers to the following subclauses (e), (f) and (g):–

- “(e) promoting the effective and efficient operation of enterprises and industries; and
- (a) ensuring wages and employment conditions provide fair standards in relation to living standards prevailing in the community; and
- (b) promoting participation in industrial relations by employees and employers; and”.

The Commission acknowledges that the Board has a responsibility to make decisions in a confidential environment to ensure the financial viability of the Company. The Commission does not accept it is appropriate to simultaneously have two agendas with one agenda having emphasis on “good faith” together with reference in the Act to “promoting participation”. On this occasion if a detailed agenda had been under active consideration by the negotiating team alternatives to redundancies may have eventuated.

Section 77 (b)(i) of the *Industrial Relations Act 1999* states:–

- “(b) whether the dismissal related to –
- (i) the operational requirements of the employer’s undertaking, establishment or service; or.”.

The Commission accepts that the Board had a responsibility to act quickly to address the financial position of the Company. As already indicated the redundancies did not result from the enterprise bargaining but enterprise bargaining may have assisted the Company to avoid redundancies if that item had been included on the agenda.

On consideration of all the evidence, submissions and exhibits the Commission is satisfied that the dismissal was for operational requirements in accordance with s. 77(b)(i) of the *Industrial Relations Act 1999*.

The application is refused.

I order accordingly.

K.L. EDWARDS, Commissioner.

Appearances:-

Mr C. Price of the Federated Engine Drivers' and Firemens' Association of Australasia Queensland Branch, Union of Employees on behalf of the applicant.
Mr G. Muir of Employer Services Pty Ltd and with him Mr P Wacker on behalf of the respondent.

Released: 12 November 2001

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QUEENSLAND INDUSTRIAL REGISTRAR

Industrial Relations Act 1999 – s. 481 – arrangement for conduct of elections

Queensland Colliery Employees Union of Employees. (Q42 of 2001)

REGISTRAR EWALD

9 November 2001

Conduct of Election – Prescribed Information – Reason for Election – Method of Election – Electoral Commission to Conduct Election.

DECISION

On 9 November 2001 the Queensland Colliery Employees Union of Employees lodged in the Registry under section 481 of the *Industrial Relations Act 1999* the information as prescribed in section 36(1) of the *Industrial Relations Regulation 2000* in relation to the conduct of an election by the Electoral Commission of Queensland for all positions of Office as follows:

<i>Office</i>	<i>Number of Positions</i>	<i>Method of Election</i>
President	1	Direct vote of members of the Organisation
Secretary	1	
<i>Divisional Representative</i>		
Northern Division	1	Direct vote of members of the particular Division
Moranbah Division	1	
Central Division	1	
Moura-Callide Division	1	
West Moreton Division	1	
Maryborough Division	1	

Calling of Nominations

Rule 7(a) of the Industrial Organisation's Rules provides for the opening of nominations on the 1st day of October. Therefore the prescribed date for filing the prescribed information would be the 1st day of August 2001. The Organisation resolved to adopt the Model Election Rules which were registered as an amendment to the Rules on 7 November 2001. I am prepared to exercise my discretion and extend the prescribed time for filing of such information to 9 November 2001.

Reason for Election

Rule 6 provides for a President, Secretary and 6 divisional representatives to be elected every four years. The Organisation advises that the terms of office for these positions have ended.

Method of Election

I am satisfied that the method of election is by a direct vote by secret postal ballot of the members of the Organisation for the positions of President and Secretary and by the members of each particular division for the Divisional Representatives.

Conduct of Election

I am satisfied that an election for the above named positions is required to be held under the Rules of the Industrial Organisation.

Therefore, under section 482 of the *Industrial Relations Act 1999*, I am making arrangements for the conduct of the election by the Electoral Commission of Queensland.

Dated this ninth day of November, 2001.

E. EWALD
Industrial Registrar

Released: 9 November 2001

QUEENSLAND INDUSTRIAL REGISTRAR

Industrial Relations Act 1999 – s. 482 – arrangement for conduct of elections

Queensland Teachers Union of Employees (No. Q40 of 2001)

REGISTRAR EWALD

12 November 2001

Request for Conduct of Elections – Prescribed Information –Electoral Commission to Conduct Elections.

SUPPLEMENTARY DECISION

On 22 October 2001 the Queensland Teachers Union of Employees lodged in the Registry under s. 481 of the *Industrial Relations Act 1999*, the information prescribed in s. 36 of the *Industrial Relations Regulation 2000*, in relation to the conduct of elections by the Electoral Commission of Queensland for the following positions of office:-

TAFE Council Representative of a Branch;
State Council Representative of a Branch; and
State Council Representative of TAFE Division.

The Decision released on 1 November 2001 did not include the 4 positions required for the State Council Representative of TAFE Division.

Therefore, under s. 482 of the *Industrial Relations Act 1999*, I am making arrangements for the elections of the 4 State Council Representatives of TAFE Division to be conducted by the Electoral Commission of Queensland.

Dated this twelfth day of November, 2001.

E. EWALD,
Industrial Registrar.

Released: 12 November 2001

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999 – section 474
Industrial Relations Regulation 2000 – section 20*

(No. U20 of 2001)

NOTICE OF APPLICATION FOR ALTERATION OF ELIGIBILITY

RULE OF AN INDUSTRIAL ORGANISATION

NOTICE is hereby given that an application has been made to register an alteration to the Eligibility Rules of **The Queensland Chamber of Fruit and Vegetable Industries Co-operative (Union of Employers) Limited**. Interested persons may obtain a copy of the application from the Applicant.

All Notices of Objection to such registration must be lodged with me within thirty-five days from the date of publication of this Notice.

Dated this thirteenth day of November, 2001.

E. Ewald,
Industrial Registrar.

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